Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, deceased,
Petitioner,

v.

MARK RASAK, D.O.,
Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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October 11, 2010

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QUESTION PRESENTED

Whether the Michigan Supreme Court erroneously held that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320, *et seq.*, permits adverse parties to conduct ex parte interviews with a plaintiff's physicians.

PARTIES TO THE PROCEEDINGS

Petitioner Andrea L. Holman, Personal Representative of the Estate of Linda Clippert, deceased, is a citizen of Michigan. Linda Clippert, also a Michigan resident, sought medical treatment from Respondent Mark Rasak, D.O. After Rasak allegedly failed to diagnose and treat her symptoms, Linda Clippert died of a cardiac arrest. Petitioner was appointed Personal Representative of Ms. Clippert's estate and filed the wrongful death suit against Respondent Rasak which gives rise to this Petition.

Respondent Mark Rasak, D.O., is a resident of and is licensed to practice medicine in Michigan. As the defendant in the underlying suit, Dr. Rasak is Respondent in this Court.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

FEDERAL REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

THE REASONS WHY CERTIORARI SHOULD BE GRANTED 10

THE MICHIGAN SUPREME COURT ERRONEOUSLY HELD THAT HIPAA PERMITS ADVERSE PARTIES TO CONDUCT EX PARTE INTERVIEWS WITH A PLAINTIFF'S PHYSICIANS. 10

A. The Michigan Supreme Court decided an important federal question in a way that conflicts with the decision of another state court of last resort. 10

1. HIPAA effectuates the compelling national interest of safeguarding the privacy of medical information and reflects the growing recognition that a

patient has a constitutional right to the privacy of her medical information. . . . 13

2. Ex parte interviews serve no legitimate purpose and harm the physician-patient relationship. 15

B. The Michigan Supreme Court "has decided an important question of federal law that has not been, but should be, settled by this Court." 20

C. The Michigan Supreme Court erroneously held that HIPAA permits adverse parties to conduct ex parte interviews with a plaintiff's physicians. 20

1. The introduction to 45 C.F.R. § 164.512 requires either that the patient authorize the disclosure or that the covered entity inform the patient of what is disclosed. It accordingly precludes ex parte oral disclosure of PHI. 21

2. The introduction to 45 CFR § 164.512 is consistent with other HIPAA regulations mandating notice to the patient of any PHI disclosed. 22

3. The plain wording and structure of 45 C.F.R. § 164.512(e)(1) establish that HIPAA precludes informal, ex parte discovery. 26

4. The Supreme Court never explains how PHI disclosed in an ex parte interview can possibly receive the protections mandated in 45 C.F.R. § 164.512(e)(1)(v). 30

CONCLUSION 37

APPENDIX

Appendix A: Opinion, State of Michigan Supreme Court (July 13, 2010) 1a

Appendix B: Opinion, State of Michigan Court of Appeals (November 18, 2008) 46a

Appendix C: Opinion and Order, State of Michigan In the Circuit Court for the County of Oakland (June 21, 2007) 54a

Appendix D: Opinion, Original Proceeding in Prohibition, Supreme Court of Missouri (August 31, 2010) 57a

TABLE OF AUTHORITIES

CASES

Anderson v. Romero,
72 F.3d 518 (7th Cir. 1995) 14

Arons v. Jutkowitz,
880 N.E.2d 831 (N.Y. 2007) 12

Baker v. Wellstar Health Sys., Inc.,
No. S10A0994, 2010 WL 2159372 (Ga. June 1, 2010) 12

Barron v. MM,
852 N.Y.S.2d 696 (N.Y. Sup. Ct. 2007) 29

Bayne v. Provost,
359 F. Supp. 2d 234 (N.D.N.Y. 2005) 6

Beard v. City of Chicago,
No. 03-C-3527, 2005 WL 66074 (N.D. Ill. Jan. 10, 2005) 12

Browne v. Horbar,
792 N.Y.S.2d 314 (N.Y. Sup. Ct. 2004) 32

Crenshaw v. Mony Life Ins. Co.,
318 F. Supp. 2d 1015 (S.D. Cal. 2004) . . . 12, 13

Crist v. Moffatt,
389 S.E.2d 41 (N.C. 1990) 16, 17

Croskey v. BMW of N. Am.,
No. 02-73747, 2005 WL 195945 (E.D. Mich. Feb. 16, 2005, Magistrate Komives), *rev'd*, (Nov. 10, 2005 order, Edmunds, J.) 12

Doe v. Attorney Gen. of the U.S.,
941 F.2d 780 (9th Cir. 1991), *vacated on other grounds sub. nom. Reno v. Doe*, 518 U.S. 1014, 116 S. Ct. 2543, 135 L. Ed. 2d 1064 (1996) . . . 14

Doe v. New York,
15 F.3d 264 (2d Cir. 1994) 14

Doe v. Se. Pa. Trans. Auth.,
72 F.3d 1133 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) 14

Domako v. Rowe,
475 N.W.2d 30 (Mich. 1991) 5

Douglas v. Dobbs,
419 F.3d 1097 (10th Cir. 2005), *cert. denied*, 546 U.S. 1138 (2006) 14

EEOC v. Boston Mkt. Corp.,
No. CV 03-4227 LDW WDW, 2004 WL 3327264 (E.D.N.Y. Dec. 16, 2004) 15, 31-32

Givens v. Mullikin,
75 S.W.3d 383 (Tenn. 2002) 16

Harris v. Thigpen,
941 F.2d 1495 (11th Cir. 1991) 14

Herring v. Keenan,
218 F.3d 1171 (10th Cir. 2000), *cert. denied*, 534 U.S. 840 (2001) 14

In re Collins,
286 S.W.3d 911 (Tex. 2009) 13

Jarvis v. Wellman,
52 F.3d 125 (6th Cir. 1995) 14

Jenkins v. Pub. Serv. Co.,
518 S.E.2d 6 (N.C. Ct. App. 1999) (Wynn, J., dissenting), *rev'd based on dissent*, 524 S.E.2d 805 (N.C. 2000) 16

Law v. Zuckerman,
307 F. Supp. 2d 705 (D. Md. 2004) 12

Lister v Superior Court,
159 Cal. Rptr. 280 (Cal. Ct. App. 1979) 28

Manion v. NPW Med. Ctr.,
676 F. Supp. 585 (M.D. Pa. 1987) 16, 34

Morrissey v. Brewer,
408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) 29

Moss v. Amira,
826 N.E.2d 1001 (Ill. App. Ct. 2005) 12, 18

Nastasi v. United Mine Workers of Am. Union,
567 N.E.2d 1358 (Ill. App. Ct. 1991) 16

Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) 14

Petrillo v. Syntex Labs., Inc.,
499 N.E.2d 952 (Ill. App. Ct. 1986) 17, 19

Planned Parenthood of Ind. v. Carter,
854 N.E.2d 853 (Ind. Ct. App. 2006) . . . 13, 14-15

Prot. & Advocacy Sys., Inc. v. Fruedenthal,
412 F. Supp. 2d 1211 (D. Wyo. 2006) 13

Rapanos v. United States,
547 U.S. 715, 126 S. Ct. 2208, 169 L. Ed. 2d 159 (2006) 26

Roosevelt Hotel Ltd. P'ship v. Sweeney,
394 N.W.2d 353 (Iowa 1986) 33

Sacramento Reg'l Cnty. Sanitation Dist. v. Thomas,
668 F. Supp. 1427 (E.D. Cal. 1987) 28

Scott v. Flynt,
704 So. 2d 998 (Miss. 1996) 16

Smith v. Am. Home Prods. Corp.,
855 A.2d 608 (N.J. Super. Ct. Law Div. 2003) 13

Sorensen v. Barbuto,
177 P.3d 614 (Utah 2008) 17, 33

Sorenson v. Barbuto,
143 P.3d 295 (Utah Ct. App. 2006) 16

Soto v. ABX Air, Inc.,
No. 07-11035, 2010 WL 3290982 (E.D. Mich. Aug. 9, 2010, Magistrate Morgan) 12

State ex rel. Kitzmiller v. Henning,
437 S.E.2d 452 (W. Va. 1993) 33

State ex rel. Proctor v. Messina,
No. SC 90610, 2010 WL 3430413 (Mo. Aug. 31, 2010) 10, 12, 19, 20, 30

United States v. Larionoff,
431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977) 28

United States v. Southerland,
143 F. Supp. 2d 609 (W.D. Va. 2001) 15

Whalen v. Roe,
429 U.S. 589, 97 S. Ct. 869 (1977) 14

STATUTES

28 U.S.C. § 1257(a) 2
42 U.S.C. § 1173(d)(2)(a) 2, 13
42 U.S.C. § 1320 1
42 U.S.C. § 1320d(4) 20
Mich. Comp. Laws § 600.2912f 29, 30

RULES

Fed. R. Civ. P. 26(b)(4)(C) 18
Sup. Ct. R. 10 10
Sup. Ct. R. 10(b) 10, 12
Sup. Ct. R. 10(c) 10
Sup. Ct. R. 13.1 2

REGULATIONS

45 C.F.R. § 160.103 ..... 6, 21
45 C.F.R. § 164.501 20
45 C.F.R. § 164.508 7
45 C.F.R. § 164.508(c) 21, 22
45 C.F.R. § 164.508(c)(1)(i) 24
45 C.F.R. § 164.508(c)(1)(iv) 24
45 C.F.R. § 164.510 ..... 7, 22
45 C.F.R. § 164.512 ..... *passim*
45 C.F.R. § 164.512(e) 8, 10, 21
45 C.F.R. § 164.512(e)(1) ..... *passim*
45 C.F.R. § 164.512(e)(1)(i) 7, 21, 24
45 C.F.R. § 164.512(e)(1)(ii) ..... *passim*
45 C.F.R. § 164.512(e)(1)(ii)(A) 25, 29
45 C.F.R. § 164.512(e)(1)(ii)(B) 8, 25, 26, 29
45 C.F.R. § 164.512(e)(1)(v) ..... *passim*
45 C.F.R. § 164.512(e)(1)(v)(A) 26, 31
45 C.F.R. § 164.512(e)(1)(v)(B) 26, 31, 36
45 C.F.R. § 164.512(e)(2) 6

OTHER AUTHORITIES

ABA Model Rule 3.4(c) 18

62 Am. Jur. 2d *Process* § 1 28

Black's Law Dictionary (5th ed. 1979) 28

Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorney: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L. J. 1001 (Summer 1990) 16, 35

HIPAA, Comment, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 BYU L. Rev. 1075 12

D. Wirtes, R. Lamberth, J. Gomez, *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiff's Treating Physicians*, 27 Am. J. Trial Advoc. (2003) ..... *passim*

OPINIONS AND ORDERS BELOW

Petitioner filed a wrongful death medical malpractice action. On June 21, 2007, Hon. John J. McDonald of the Oakland County Circuit Court, State of Michigan, issued an opinion and order denying Respondent's motion for a protective order authorizing ex parte oral interviews with the decedent's treating physicians. Judge McDonald held that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320, *et seq.*, did not authorize ex parte oral interviews but only the release of documentary evidence. (Appx. 54a).

Respondent filed an application for leave to appeal from the trial court's order denying the protective order to the Michigan Court of Appeals. On November 18, 2008, the Michigan Court of Appeals issued a published decision reversing the trial court and holding that HIPAA provides for release of oral information and does not preclude defense attorneys from conducting ex parte interviews with plaintiffs' physicians. *Holman v. Rasak*, 761 N.W.2d 391 (Mich. Ct. App. 2008) (Appx. 46a).

Petitioner applied for leave to appeal in the Michigan Supreme Court. The application was granted on May 7, 2009. 764 N.W.2d 573 (2009). On July 13, 2010, the Michigan Supreme Court issued a 5-2 decision affirming the Court of Appeals and holding that HIPAA permits disclosure of protected health information during an ex parte interview "as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 C.F.R. § 164.512(e)(1)(v)].'"

Holman v. Rasak, 785 N.W.2d 98, 107-108 (Mich. 2010) (Appx. 19a).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(a), which states that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The Judgment of the Michigan Supreme Court was entered on July 13, 2010. This Petition, filed within 90 days of the Michigan Supreme Court's Judgment, is timely under Sup. Ct. Rule 13.1.[1]

FEDERAL REGULATIONS INVOLVED

This appeal turns on the interpretation of the following HIPAA regulations, promulgated at Congress' instruction, 42 U.S.C. § 1173(d)(2)(a):

The introduction to 45 C.F.R. § 164.512, which states:

> A covered entity may use or disclose protected health information without the written

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[1] Because October 11, 2010, the 90th day after the Michigan Supreme Court decision, is a federal holiday, Petitioner files this Writ on October 12, 2010.

authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

45 C.F.R. § 164.512(e)(1), stating:

(e) Standard: Disclosures for judicial and administrative proceedings.

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> > (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> >
> > (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
> >
> > > (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section,

> from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

And 45 C.F.R. § 164.512(e)(1)(v), providing that a "qualified protective order":

> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

STATEMENT OF THE CASE

Petitioner filed a medical malpractice wrongful death action alleging that the decedent, Linda

Clippert, died as a result of Respondent Rasak's failure to diagnose and treat her cardiac condition. (Appx. 2a). Respondent informed Petitioner that his attorneys intended to conduct ex parte interviews with the decedent's physicians. (Id.). Petitioner refused to authorize the interviews under HIPAA. (Id.).

Respondent moved for a protective order permitting the ex parte interviews. (Id., 2a-3a). The trial court, Hon. John J. McDonald of the Oakland County Circuit Court, State of Michigan, denied the motion, concluding that "HIPAA does not authorize ex parte oral interviews because the HIPAA provision relative to a qualified protective order only seems to pertain to documentary evidence." (Appx. 56a).

Respondent applied for leave to the Michigan Court of Appeals. On November 18, 2008, the Michigan Court of Appeals issued a published decision reversing the trial court and holding that HIPAA does not preclude defense attorneys from conducting ex parte interviews with plaintiffs' physicians. *Holman v. Rasak*, 761 N.W.2d 391 (Mich. Ct. App. 2008) (Appx. 46a). The court ruled:

> [W]e disagree with the circuit court's determination that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA. While 45 § C.F.R. 164.512(e)(1)(ii) does not specifically address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure of protected health information. As our Supreme Court observed in [*Domako v. Rowe*, 475 N.W.2d 30 (Mich. 1991)], where rules

> are not meant to be exhaustive, 'the omission of oral interviews does not mean that they are prohibited.' In fact, 45 C.F.R. § 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 C.F.R. § 164.512(e)(2) makes clear that the regulations concerning qualified protective orders 'do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.' Thus, as the federal district court determined in [*Bayne v. Provost*, 359 F. Supp. 2d 234, 241 (N.D.N.Y. 2005)], 'if a qualified protective order, consistent with [45 C.F.R. § 164.512(e)], was in place then an *ex parte* discussion with the health provider would be appropriate.'

(Appx. 52a).

Petitioner applied for leave to appeal in the Michigan Supreme Court. The application was granted on May 7, 2009. 764 N.W.2d 573 (Mich. 2009). Six organizations filed amicus briefs. They were the Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., ProAssurance Casualty Company, American Physicians Assurance Corporation, the Michigan Health and Hospital Association, and the Michigan State Medical Society. *Holman v. Rasak*, 785 N.W.2d 98, 100 (Mich. 2010).

On July 13, 2010, the Michigan Supreme Court issued a 5-2 decision affirming the Court of Appeals. *Id.* (Appx. 1a). The court held that HIPAA does not preempt Michigan law, which allows defense counsel to conduct ex parte interviews with treating physicians once the plaintiff waives the physician-patient

privilege by putting her medical condition in controversy, because HIPAA permits disclosure of protected health information during an ex parte interview "as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 C.F.R. § 164.512(e)(1)(v)].'" *Id.*, 785 N.W.2d at107-108 (Appx. 19a). The majority stated:

1. "Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 C.F.R. § 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 C.F.R. § 164.510." (Appx. 10a). "45 C.F.R. § 164.512, however, enumerates several specific situations in which '[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 C.F.R. §] 164.508, or the opportunity for the individual to agree or object as described in [45 C.F.R. §] 164.510....' 45 C.F.R. § 164.512." (Appx. 10a-11a).

2. "This regulation provides alternative requirements for disclosures in specific situations." (Appx. 11a). "Relevant here is" 45 C.F.R. § 164.512(e)(1)(i) and (ii). (*Id.*).

3. "Accordingly, we conclude that Michigan's approach to informal discovery, which permits defense counsel to seek an ex parte interview with a plaintiff's treating physician, is not 'contrary' to HIPAA. An ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as '[t]he covered entity receives satisfactory assurance ... that reasonable efforts have been made ... to secure a qualified protective order that meets the requirements of [45 C.F.R. § 164.512(e)(1)(v)].'" (Appx. 19a, quoting 45 C.F.R. § 164.512(e)(1)(ii)(B)).

Justice Hathaway, joined by Justice Weaver, dissented. (Appx. 24a-25a). Justice Hathaway concluded:

1. "The introductory portion of 45 C.F.R. § 164.512 specifically limits *oral* disclosures of a covered entity's information to instances "[w]hen the covered entity is *required by this section* to inform the individual of, *or when the individual may agree to*, a use or disclosure permitted by this section . . ." (Appx. 25a-26a, Hathaway, J., dissenting; original emphasis).

2. "[E]ven if the introductory language limiting oral disclosures didn't exist," subsection 164.512(e)(1)(ii)(B) does not authorize informal, ex parte discovery, but applies only "if there is a corresponding judicial or

administrative procedure available under state law or court rule." (*Id.*, 32a-33a).

3. The qualified protective order provision in 45 C.F.R. § 164.512(e)(1)(v) also does not authorize ex parte physician interviews. (*Id.*, 34a). "A verbal ex parte interview cannot be returned or destroyed at the conclusion of the litigation." (*Id.*). "The fact that an interview *could be* recorded or memorialized, thus creating something that could be returned or destroyed, does not resolve the analytical problem as the majority suggests. HIPAA's return-or-destroy provision is *mandatory* and *not permissive*, and we are not free to rewrite HIPAA's mandates; we are required to follow them." (*Id.*; original emphasis).

Petitioner now files this Writ of Certiorari.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

THE MICHIGAN SUPREME COURT ERRONEOUSLY HELD THAT HIPAA PERMITS ADVERSE PARTIES TO CONDUCT EX PARTE INTERVIEWS WITH A PLAINTIFF'S PHYSICIANS.

A. The Michigan Supreme Court decided an important federal question in a way that conflicts with the decision of another state court of last resort.

This appeal meets two of the three alternate standards in S. Ct. Rule 10 for granting certiorari. First, the Michigan Supreme Court "decided an important federal question in a way that conflicts with the decision of another state court." Sup. Ct. Rule 10(b). About five weeks after the Michigan Supreme Court's decision, the Missouri Supreme Court, that state's court of last resort, in *State ex rel. Proctor v. Messina*, No. SC 90610, 2010 WL 3430413 (Mo. Aug. 31, 2010) (Appx. 57a), unanimously held:

> The trial court is correct that the [the Health and Human Services Secretary] created exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information and that some of those exceptions are listed in 45 C.F.R. § 164.512(e). The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a

meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician.

Stated another way, 45 C.F.R. § 164.512(e)(1) permits a health care provider to disclose otherwise protected health information '***in the course of any judicial or administrative proceeding***' if that disclosure is in response to (i) an order of a court, or (ii) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court. (Emphasis added). Thus, by the express language of 45 C.F.R. § 164.512(e)(1), the covered entity's disclosure must occur 'in the course of' a 'judicial proceeding,' and it must be made in response either to a formal process, whether in the form of a court order, discovery request or other lawful process. . . .

. . . 45 C.F.R. § 164.512(e), which permits disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications, and consequently, a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physician that they may or may not participate in informal discovery via *ex parte* communications. . . .

[T]here is no regulation in the HIPAA framework that authorizes a trial court in Missouri to issue an order permitting a physician to divulge a patient's protected health information outside the confines of a judicial

> proceeding over which the trial court has direct supervision thereof.

(*Id.*; 78a, 83a, 84a) (original emphasis).

Like the Missouri Supreme Court, other state and federal jurisdictions have either held or suspected that HIPAA precludes ex parte physician interviews. See, *Croskey v. BMW of N. Am.*, No. 02-73747, 2005 WL 1959452 (E.D. Mich. Feb. 16, 2005, Magistrate Komives), *rev'd*, (Nov. 10, 2005 order, Edmunds, J.); *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004); *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004), *Beard v. City of Chicago*, No. 03-C-3527, 2005 WL 66074, p 3 (N.D. Ill. Jan. 10, 2005); *Moss v. Amira*, 826 N.E.2d 1001, 1010 (Ill. App. Ct. 2005) (Quinn, J., concurring), citing D. Wirtes, R. Lamberth, J. Gomez, *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiff's Treating Physicians*, 27 Am. J. Trial Advoc., at 5-6 (2003); *Soto v. ABX Air, Inc.*, No. 07-11035, 2010 WL 3290982, *3 (E.D. Mich. Aug. 9, 2010, Magistrate Morgan); see also, HIPAA, Comment, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 BYU L. Rev. 1075.

Other jurisdictions, like the Michigan Supreme Court, have concluded that HIPAA does not preclude ex parte interviews. See, e.g., *Baker v. Wellstar Health Sys., Inc.*, No. S10A0994, 2010 WL 2159372 (Ga. June 1, 2010); *Arons v. Jutkowitz*, 880 N.E.2d 831 (N.Y. 2007).

This conflict also involves an important federal question. Sup. Ct. R. 10(b). Resolution of this issue

has profound implications not only for the course of litigation in American courts, but for the nature of the physician-patient relationship.

1. HIPAA effectuates the compelling national interest of safeguarding the privacy of medical information and reflects the growing recognition that a patient has a constitutional right to the privacy of her medical information.

Congress passed HIPAA, in substantial part, "to protect the security and privacy of individually identifiable health information." *Smith v. Am. Home Prods. Corp.*, 855 A.2d 608, 611 (N.J. Super. Ct. Law Div. 2003). In that regard, Congress instructed the Secretary of the Dept. of Health and Human Services to create national standards to "ensure the integrity and confidentiality" of health information. *Smith*, *supra*, citing HIPAA 42 U.S.C. § 1173(d)(2)(a). Safeguarding the privacy of a patient's medical information is HIPAA's "primary" goal. *In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009); *Prot. & Advocacy Sys., Inc. v. Fruedenthal*, 412 F. Supp. 2d 1211, 1220 (D. Wyo. 2006).

HIPAA represents national recognition of the growing importance of protecting patient privacy. Courts characterize "a patient's right to the confidentiality of his or her individual medical information" as "a compelling federal interest," *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1028 (S.D. Cal. 2004), and vitally important, *Planned Parenthood of Ind. v. Carter*, 854 N.E.2d 853, 874 n. 30 (Ind. Ct. App. 2006).

Even more, federal and state courts increasingly hold that patients have a constitutional right to the privacy of their medical information. This Court has long recognized that the right to privacy under the Fourteenth Amendment protects an individual's right to control the nature and extent of information released about her.[2] *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869; 51 L. Ed. 2d 64 (1977); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (noting that the right to privacy includes an "individual interest in avoiding disclosure of personal matters"). Based on this, the overwhelming majority of federal circuit courts of appeals addressing the issue now conclude the constitutional right to privacy extends to medical or prescription records. *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005), *cert. denied*, 546 U.S. 1138 (2006); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000), *cert. denied*, 534 U.S. 840 (2001); *Doe v. Se. Penn. Trans. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995); *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994); *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 795-796 (9th Cir. 1991), *vacated on other grounds sub. nom. Reno v. Doe*, 518 U.S. 1014, 116 S. Ct. 2543, 135 L. Ed. 2d 1064 (1996); *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991); *contra: Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that the constitutional right of privacy does not apply to medical records). At least two courts have specifically linked HIPAA to the developing constitutional right to patient privacy. *Planned*

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[2] Because both the Petitioner and decedent in this case are women, Petitioner uses the feminine personal pronoun.

Parenthood, *supra* ("HIPAA indicates that Congress has recognized the vital importance of, if not a constitutional right to, personal privacy with respect to medical information."); *United States v. Southerland*, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001) (HIPAA's regulations "demonstrate a strong federal policy of protection for patient medical records;" moreover, "disclosure of medical records touches on constitutional concerns.").

In *EEOC v. Boston Market Corp.*, No. CV 03-4227 LDW WDW, 2004 WL 3327264, *5 (E.D.N.Y. Dec. 16, 2004), the court held that ex parte physician interviews disclosing protected health information are inconsistent with the strong federal policy safeguarding patient privacy. The court accordingly refused to permit any ex parte release of the plaintiff's protected health information – even with a protective order under HIPAA. *Id.* at *6.

2. Ex parte interviews serve no legitimate purpose and harm the physician-patient relationship.

Resolution of this question has significant implications for both the course of litigation in American courts and the nature of the physician-patient relationship. The Respondent, like other advocates of ex parte physician interviews, incorrectly claims that they serve judicial efficiency, promote settlement, and "level" the litigation playing field. In practice, the principal purpose behind ex parte interviews is to influence and alienate the plaintiff's doctors. Wirtes, Lamberth and Gomez agree with another commentator that "[i]t was recognized years ago that '[e]x parte contracts are a 'hardball' tactic

long favored by the defense bar, particularly in medical malpractice suits.'" Wirtes, *supra*, 27 Am. J. Trial Advoc. at 9, quoting Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorney: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L. J. 1001-1002 (Summer 1990). The North Carolina Supreme Court adopted the dissent of Judge Wynn, who cautioned that ex parte contacts with a defense counsel "can place a doctor in an 'untenable position,' one which supports the possibility of undue influence upon the doctor." *Jenkins v. Pub. Serv. Co.*, 518 S.E.2d 6, 13 (N.C. Ct. App. 1999) (Wynn, J., dissenting), *rev'd based on dissent*, 524 S.E.2d 805 (N.C. 2000); see also *Nastasi v. United Mine Workers of Am. Union*, 567 N.E.2d 1358, 1365 (Ill. App. Ct. 1991) (noting that defense counsel can use medical information obtained "to influence or alter the opinions of plaintiff's treating doctors"); *Manion v. NPW Med. Ctr.*, 676 F. Supp. 585, 594-595 (M.D. Pa. 1987) (discussing the ways defense counsel can use ex parte interviews to influence doctors).

The clear majority of state courts have held that their privacy rules, which are analogous to HIPAA, now bar ex parte interviews. See *Sorenson v. Barbuto*, 143 P.3d 295, 301 (Utah Ct. App. 2006) (A "strong majority view" in state courts "condemns ex parte conferences."); *Givens v. Mullikin*, 75 S.W.3d 383, 409 n. 13 (Tenn. 2002); *Scott v. Flynt*, 704 So.2d 998, 1005 (Miss. 1996); *Crist v. Moffatt*, 389 S.E.2d 41, 48 (N.C. 1990). "The emerging consensus adheres to the position that defense counsel is limited to the formal methods of discovery enumerated by the jurisdiction's rules of civil procedure, absent the patient's express consent to the counsel's ex parte contact with her treating physician." *Crist*, *supra* at 45. State courts

cite several compelling reasons why ex parte physician interviews must be precluded:

1. Ex parte interviews prejudice plaintiffs, because their attorneys have no chance to preclude release of unauthorized protected health information under HIPAA or to prevent undue influence of doctors. Wirtes, *supra*, 27 Am. J. Trial Advoc. at 9-10.

2. Ex parte interviews harm doctors. *Id* at 10-14. These interviews place doctors in a catch-22 between their Hippocratic Oath, their fiduciary duty to the patient, HIPAA's regulations, and potential sympathies or loyalties to defense counsels' clients. *Id*; *Crist*, *supra*, 389 S.E.2d at 48; *Petrillo v. Syntex Labs., Inc*, 499 N.E.2d 952, 959-962 (Ill. App. Ct. 1986).

3. Ex parte interviews damage the physician-patient relationship. *Id.*, 499 N.E.2d at 959 ("[W]hen a physician and defense counsel engage in an ex parte conference regarding the confidences of the patient . . . the confidentiality which once existed between the patient and his physician is completely disregarded and the sanctity of the relationship existing between a patient and his physician is thereby destroyed."); *Sorensen v. Barbuto*, 177 P.3d 614, 619-620 (Utah 2008) ("Allowing ex parte communications between a treating physician and opposing parties in litigation would undermine the physician-patient relationship because patients would lack

adequate assurance that their candid responses to questions important to determining their appropriate medical treatment would remain confidential."); *Moss v. Amira*, 826 N.E.2d 1001, 1006 (Ill. App. Ct. 2005) ("Ex parte communications between defense counsel and plaintiff's treating physician are prohibited as violative of public policy because they jeopardize the sanctity of the confidential and fiduciary relationship between a physician and his patient").

4. The interviews harm the civil justice system. They are contrary to the traditional concepts of notice, the opportunity to object, and judicial oversight. Wirtes, *supra*, at 14-15.

5. They also potentially harm defense attorneys. *Id.* at 15-17. The ABA's Model Rules "do not explicitly prohibit ex parte contacts with an opposing party's expert witness, (but) a lawyer who engages in such contracts may violate Model Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(C)." *Id.* at 16 (citations omitted). As such, "allowing unfettered ex parte communications with plaintiff's treating physicians raises significant ethical problems for defense attorneys, especially when the physician may be characterized as an expert witness." *Id.* at 15.

In *Proctor*, *supra*, the Missouri Supreme Court explained:

> An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising costs of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

Id., n. 4 (citation omitted) (Appx. 71a).

Defendant's proffered reasons for conducting ex parte interviews pale in comparison to these powerful concerns. The alleged policies of cost-savings and efficiency can be served if the plaintiff's counsel attends the interview. Moreover, several courts have rejected the arguments that ex parte meetings garner significant savings of time and resources, "level the playing field," or foster settlement. See *Petrillo*, *supra*, 499 N.E.2d at 962-965 (other cases cited).

The Michigan Supreme Court's construction of HIPAA's regulations ensures that attorneys and insurance companies will continue to use ex parte interviews to influence doctors, undermine the

physician-patient relationship, and obtain protected information without HIPAA safeguards. The federal question presented is of great importance.

B. The Michigan Supreme Court "has decided an important question of federal law that has not been, but should be, settled by this Court."

Even if the Michigan Supreme Court decision did not conflict with *Proctor* and other cases, this appeal also meets the certiorari standard of Sup. Ct. Rule 10(c). As demonstrated, the issue whether HIPAA permits ex parte physician interviews is an important and wide-ranging issue of federal law that should be settled by this Court.

C. The Michigan Supreme Court erroneously held that HIPAA permits adverse parties to conduct ex parte interviews with a plaintiff's physicians.

For purposes of this case, HIPAA and its regulations define protected heath information (PHI) as "any information, whether oral or recorded in any form or medium that . . . is created and received by a health care provider . . . and relates to past, present or future physical or mental health or condition of an individual . . ." 42 U.S.C. § 1320d(4); 45 C.F.R. § 160.103 (emphasis added). Covered entities are prohibited from disclosing PHI except as the regulations require or permit. 45 C.F.R. §§ 164.501 and 160.103. "Disclosure" includes divulging or providing access to PHI. 45 C.F.R. § 164.501. As "health care providers," Plaintiff's treating doctors are

"covered entities" and subject to HIPAA. 45 C.F.R. § 160.103.

Plaintiff's health care providers may disclose PHI under HIPAA's regulations only if (1) Plaintiff executes a proper, written authorization, 45 C.F.R. § 164.508(c); (2) in response to a court order, 45 C.F.R. § 164.512(e)(1)(i); or (3) "[i]n response to a subpoena, discovery request, or other lawful process" along with satisfactory assurance to the health care provider that Plaintiff has received notice of the request or the defendant has made reasonable efforts to secure a protective order (under 45 C.F.R. § 164.512(e)(1)(v)) requiring that the information receive mandatory HIPAA protections, 45 C.F.R. § 164.512(e)(1)(ii). Since Respondent seeks disclosure of Plaintiff's PHI during a lawsuit, 45 C.F.R. § 164.512(e), which governs disclosures during judicial or administrative proceedings, applies. As Justice Hathaway's dissent explains, the introduction to § 164.512 precludes ex parte, oral disclosures of PHI.

1. **The introduction to 45 C.F.R. § 164.512 requires either that the patient authorize the disclosure or that the covered entity inform the patient of what is disclosed. It accordingly precludes ex parte oral disclosure of PHI.**

The introduction to § 164.512 states:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual

> to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.* (emphasis added).

Justice Hathaway's dissent is correct that, by its plain language, subsection 512's introduction permits oral release of PHI only if the patient specifically authorizes it, or if the covered entity informs the patient of what PHI is disclosed.

2. The introduction to 45 CFR § 164.512 is consistent with other HIPAA regulations mandating notice to the patient of any PHI disclosed.

The majority opinion in this case also overlooks the fact that, for each potential category of disclosure, HIPAA consistently mandates that the patient either authorize or receive specific notice of any PHI disclosed. This further confirms that HIPAA precludes ex parte interviews.

45 C.F.R. § 164.508(c) requires any written authorizations to include "Core elements and requirements." These are:

> (1) Core elements. A valid authorization under this section must contain at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.

(iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.

(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a

> description of such representative's authority to act for the individual must also be provided.

Id. (emphasis added).

HIPAA's prerequisites to disclosure of PHI are stringent. The patient does not blindly authorize release of any and all information for any purpose. The PHI to be disclosed is specifically and meaningfully described. 45 C.F.R. § 164.508(c)(1)(i). Each purpose for use of the PHI must also be identified. 45 C.F.R. § 164.508(c)(1)(iv).

The second permissible type of PHI disclosure, under a court order, also requires previous, specific identification of the PHI to be disclosed. 45 C.F.R. § 164.512(e)(1)(i) is clear that PHI may be disclosed "[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." *Id.* (emphasis added). Once again, HIPAA's prior notice requirement is inconsistent with ex parte interviews.

45 C.F.R. § 164.512(e)(1)(ii), addressing the third category for disclosure of PHI, also requires prior identification of the information requested. This regulation's opening clause permits PHI disclosure "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal." *Id.* (emphasis added). The words "in response to" unambiguously confirms that the PHI must be requested in "a subpoena, discovery request, or other lawful process." As demonstrated above, each of these

terms connote formal discovery and notice to the plaintiff.

The alternate clauses of 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B) further verify that all PHI must be previously and specifically requested. Subprovision (A) requires the requesting party to satisfactorily assure the provider that reasonable efforts have been made to ensure that "the individual who is the subject of the protected health information that has been requested has been given notice of the request." (emphasis added). As before, subsection (A) maintains the advance notice requirement integral to the other forms of PHI disclosure.

Subsection (B) also requires advance notice of the PHI requested. It precludes disclosure in response to a subpoena, discovery request or other lawful process unless the requesting party satisfactorily assures the provider that it has made reasonable efforts to "secure a qualified protective order that meets the requirements of paragraph 45 C.F.R. § 164.512(e)(1)(v). Subsection (e)(1)(v) provides that a "qualified protective order":

> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(emphasis added).

As the underlined clauses show, 45 C.F.R. § 164.512(e)(1)(v)(A) and (B) uses the definite article "the." Unlike an indefinite article, such as "a" or "any," the definite article "the" has "a specifying or particularizing effect." See *Rapanos v. United States*, 547 U.S. 715, 716, 126 S. Ct. 2208, 169 L. Ed. 2d 159 (2006). The term 'the protected health information" must refer to specific or particular PHI.

Since the protective order regulation is referenced in 45 C.F.R. § 164.512(e)(1)(ii)(B), "the protected health information" in subprovisions (e)(1)(v)(A) and (B) must refer back to the PHI requested in "a subpoena, discovery request, or other lawful process" under § 164.512(e)(1)(ii). As such, like the other two categories, before disclosure, PHI must be specifically identified in "a subpoena, discovery request, or other lawful process."

An ex parte interview, by its very nature, deprives the plaintiff of any advance notice of what PHI is being requested. Because HIPAA mandates prior specification of the PHI requested, HIPAA precludes ex parte interviews.

3. The plain wording and structure of 45 C.F.R. § 164.512(e)(1) establish that HIPAA precludes informal, ex parte discovery.

45 C.F.R. § 164.512(e)(1) provides:

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order

> that meets the requirements of paragraph (e)(1)(v) of this section.

Like other courts concluding that HIPAA does not preclude ex parte physician interviews, the Michigan Supreme Court disregards the plain wording of 45 C.F.R. § 164.512(e)(1)(ii). This regulation expressly states that PHI may only be disclosed "in the course of any judicial or administrative proceeding" and "[i]n response to a subpoena, discovery request, or other lawful process." An ex parte interview is not a "subpoena," issued with requisite notice. It is not a "discovery request." The only category under § 164.512(e)(1)(ii) that arguably applies to ex parte interviews is "other lawful process."

Principles of statutory construction govern construction of administrative rules, *Sacramento Reg'l Cnty. Sanitation Dist. v. Thomas*, 668 F. Supp. 1427, 1432 (E.D. Cal. 1987). A regulation must accordingly be construed according to its plain meaning. *Id.*; see also *United States v. Larionoff*, 431 U.S. 864, 872-73, 97 S. Ct. 2150, 2155-56, 53 L. Ed. 2d 48 (1977).

Black's Law Dictionary (5th ed. 1979) defines "lawful process" as "a summons, writ, warrant, mandate, or other process issuing from a court." "The term 'process' is synonymous with 'proceeding' and embraces the entire proceedings in an action from beginning to end." *Lister v. Superior Court*, 159 Cal. Rptr. 280, 283 (Cal. Ct. App. 1979); *see* 62 Am. Jur. 2d *Process* § 1.

Any "lawful process" must afford the parties the basic requirement of procedural "due process." Of course, this includes notice and an opportunity to be

heard. *Morrissey v. Brewer,* 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972). Plaintiff will not receive notice of when the Defendant interviews her doctors. She is not given advance, prior notice of the PHI defense counsel intends to request. She will not be given the opportunity to attend and raise objections if the interview exceeds the scope of relevant PHI.[3]

The Michigan Supreme Court majority incorrectly holds that 45 C.F.R. § 164.512(e)(1)(ii)(B) requires only assurance to the provider that "reasonable efforts have been made by such party to secure a qualified protective order . . ." The majority's analysis skips over the prerequisite that, before PHI may be disclosed under either 45 CFR § 164.512(e)(1)(ii)(A) or (B), "a subpoena, discovery request, or other lawful process" must be served on the health care provider. The words "in response" establish that a specific request for disclosure of PHI must be made through subpoena, discovery request or other lawful process. Contact with the health care provider cannot precede the "a subpoena, discovery request, or other lawful process." It is the subpoena, discovery request, or other lawful process that must contain the request for PHI, not some previous or ex parte communication.

The Michigan Supreme Court also mistakenly implies that Mich. Comp. Laws § 600.2912f equates ex parte interviews with "other lawful process." Mich.

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[3] One case that actually addressed HIPAA's requirement of "lawful process," *Barron v. MM*, 852 N.Y.S.2d 696, 699 (N.Y. Sup. Ct. 2007), held that this rule is satisfied when medical records are produced at a show cause hearing that the respondent received notice of and at which had an opportunity to appear.

Comp. Laws § 600.2912f permits adverse parties to interview a potential medical malpractice plaintiff's doctors once the plaintiff has given notice of her intent to file a later action. This statute does not set forth any lawful process occurring "in the course of any judicial or administrative proceeding." It is a pre-suit, extra-judicial procedure.[4] It clearly does not comply with HIPAA.

Both the plain wording and structure of 45 C.F.R. § 164.512(e)(1)(ii) confirm the analysis of the cases, cited in Section A, holding or questioning whether HIPAA precludes ex parte physician interviews.

4. The Supreme Court never explains how PHI disclosed in an ex parte interview can possibly receive the protections mandated in 45 C.F.R. § 164.512(e)(1)(v).

In addition to misconstruing the language and structure of 45 C.F.R. § 164.512(e)(1)(ii), and HIPAA's notice requirements, neither the Michigan Supreme Court nor other cases reconciling HIPAA to permit ex parte interviews adequately explained how PHI orally requested and orally disclosed without the patient's knowledge can possibly be protected under 45 C.F.R. § 164.512(e)(1)(v). As Justice Hathaway correctly

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[4] Because an ex parte interview does not constitute "other lawful process" under 45 C.F.R. § 164.512(e)(1), the Michigan Supreme Court's decision conflicts with the Missouri Supreme Court's opinion in *Proctor*, *supra*. *Proctor's* citation to *Holman* and Mich. Comp. Laws § 600.2912f as an example of another's state's ruling on this issue does not address whether the Michigan Supreme Court's ruling was consistent with its own HIPAA analysis. *Id.* n. 7 (Appx. 81a).

notes, the fact that some ex parte interviews could be tape recorded ignores HIPAA's mandatory requirements.

It is uncontested that any PHI disclosed "in response to a subpoena, discovery request, or other lawful process" must not be used or disclosed for "any purpose other than the litigation or proceeding for which such information was requested" and must be destroyed "at the end of the litigation or proceeding." 45 C.F.R. § 164.512(e)(1)(v)(A) and (B). Because the plaintiff does not receive advance notice of the specific PHI requested and may not observe the PHI actually requested and disclosed during an ex parte interview, she cannot receive the protections mandated by 45 C.F.R. § 164.512(e)(1)(v). This unmistakable fact further demonstrates that HIPAA precludes ex parte physician interviews.

In an ex parte interview, the plaintiff does not receive advance notice of the questions defense counsel will ask and, since she cannot attend, does not know what PHI is requested or disclosed. Petitioner is at a loss how PHI orally disclosed only to defense counsel can be properly identified to ensure that it is not used or disclosed "for any purpose other than the litigation or proceeding for which such information was requested" and returned and destroyed (with all copies) at the end of the case. 45 C.F.R. § 164.512(e)(1)(v)(A) and (B).

National cases and commentators repeatedly caution that the patient's privacy rights cannot be protected when her medical information is disclosed during an ex parte interview. As previously cited, in *EEOC v. Boston Mkt. Corp.*, No. CV 03-4227 LDW

WDW, 2004 WL 3327264, *5 (E.D.N.Y. Dec. 16, 2004), the court held "ex parte communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create, as the court in [*Law*, *supra*] warned, too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records." The *EEOC* case recognized that the patient's HIPAA protections cannot safeguard PHI orally disclosed ex parte.

Numerous state and federal courts, rejecting outright the legality of ex parte physician interviews, explain that privacy rights cannot be protected because the patient's attorney does not attend and monitor the interview. In *Browne v. Horbar*, 792 N.Y.S.2d 314, 319 (N.Y. Sup. Ct. 2004), the court explained:

> Private interviews outside the patient or patient representative's presence present very troubling confidentiality problems. In the course of private interviews a treating physician may release information about a patient that has not even been communicated to that patient. Additionally, there is a very real risk that defense counsel may inquire into matters that do not relate to the condition at issue and, unlike in the context of judicially supervised disclosure proceedings, no one is present to ensure that the patient's rights are not violated. While it is clear that certain privacy rights are waived by commencement of a medical malpractice action, it is equally clear that there are limitations on the waiver.

The West Virginia Supreme Court declared that "[t]he danger of ex parte interviews of a doctor by adverse counsel is that the patient's lawyer is afforded no opportunity to object to the disclosure of medical information that is remote, irrelevant, or compromising in a context other than the lawsuit at hand." *State ex rel. Kitzmiller v. Henning*, 437 S.E.2d 452, 455 (W. Va. 1993). The Iowa Supreme Court similarly indicated that ex parte interviews do not adequately protect a patient's privacy:

> We are concerned . . . with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume the burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes.

Roosevelt Hotel Ltd. P'ship v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986). Just last year, the Utah Supreme Court, in *Sorensen v. Barbuto*, 177 P.3d 614, 619-620 (Utah 2008), precluded ex parte physician interviews, stating, in material part:

> [A]ppropriately limiting the scope of a treating physician's disclosure requires judicial monitoring that cannot occur in the context of ex parte communications. . . . [P]ermitting ex parte communications between a treating

> physician and an opposing counsel would make it impossible for a patient or a court to appropriately monitor the scope of the physician's disclosures. . . . [A] patient's waiver of privilege does not mean that everything disclosed to or learned by a physician in the course of treating a patient is subject to disclosure once a patient's physical or mental condition is at issue in litigation.

Moreover, the federal court, in *Manion v. NPW Medical Center*, 676 F. Supp. 585, 594-595 (M.D. Pa. 1987), correctly stated that the danger of violating patient privacy rights is even stronger in medical malpractice claims, such as this case:

> When a plaintiff's treating physician is interviewed *ex parte* by defense counsel without prior notice to the plaintiff or his counsel, there are no safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the plaintiff/patient, and the potential for breaches in the confidentiality between a patient and his physician could have a chilling effect upon the patient-physician relationship.
>
> Furthermore, the unauthorized *ex parte* interview of a plaintiff's treating physician by defense counsel creates a situation which may invite questionable conduct. This court will not overlook the current concerns in the medical malpractice insurance industry and the attitudes of physicians and carriers alike. An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a

> jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

Commentators echo the fact that ex parte doctor meetings violate the patient's right to know what private medical information is being disclosed. Philip Corboy concludes that "[s]ecret meetings between defense lawyers and treating physicians are an affront to both the rights of patients, who are entitled to place their trust in their doctors, and the rights of patients to a fair trial of their claims against alleged wrongdoers." Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorney: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 Loy. U. Chi. L. J. 1001, 1038 (Summer 1990). David Wirtes, Jr., R. Edwin Lamberth, and Joanna Gomez assert that the patient's expectation of privacy "is trampled when defense attorneys communicate in secret with a plaintiff's physicians about the defense of a lawsuit." D. Wirtes, R. Lamberth, J. Gomez, *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiff's Treating Physicians*, 27 Am. J. Trial Advoc., at 5-6 (2003).

Respondent incorrectly argued below that PHI orally disclosed in an ex parte interview can satisfy a protective order under 45 C.F.R. § 164.512(e)(1)(v). Respondent claims that oral PHI is no different than medical records, because, once disclosed, both remain in the defense counsel's mind.

Respondent overlooks the fact that medical records, reports, and deposition transcripts memorialize the specific PHI disclosed. Once a record, report, or deposition transcript is returned or destroyed, the plaintiff knows the disclosure itself is secure. This is not the same with PHI disclosed in an ex parte interview.

PHI revealed in ex parte physician interviews cannot possibly receive the mandatory protections under 45 C.F.R. § 164.512(e)(1)(v). The interview is not monitored and not memorialized. Without knowing what defense counsel is asking and what the doctor discloses, there is no way the PHI disclosed can even be adequately identified. There is no way of ensuring that the PHI will not be otherwise disclosed. Unlike a record or the transcript of oral testimony, orally disclosed PHI in an ex parte interview cannot be "returned" or "destroyed" at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(v)(B). A qualified protective order under 45 C.F.R. § 164.512(e)(1)(v) cannot protect Plaintiff's privacy rights under HIPAA.

After reviewing HIPAA and the practical effect of ex parte interviews, Wirtes, Lamberth and Gomez conclude that "[e]x parte communications between defense counsel and a plaintiff's treating physician for the purpose of gaining a strategic advantage in the defense of a civil lawsuit . . . violate both the letter and

the spirit of the [Health Insurance Portability and Accountability Act of 1996]." Wirtes, *supra*, 27 Am. J. Trial Advoc. at 9. They are unquestionably correct.

Ex parte interviews inherently conflict with the structure and formal procedures of HIPAA's regulations. Defense counsel requesting PHI during ex parte meetings violate HIPAA's requirement that, before disclosure, all PHI requested must be specifically identified. Unmonitored ex parte interviews also violate the patient's right to privacy and her privilege over PHI unrelated to the litigation. HIPPA therefore precludes ex parte interviews with a plaintiff's physicians.

CONCLUSION

WHEREFORE, Petitioner asks this Court to grant her petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 11, 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, State of Michigan Supreme Court (July 13, 2010) 1a

Appendix B: Opinion, State of Michigan Court of Appeals (November 18, 2008) 46a

Appendix C: Opinion and Order, State of Michigan In the Circuit Court for the County of Oakland (June 21, 2007) 54a

Appendix D: Opinion, Original Proceeding in Prohibition, Supreme Court of Missouri (August 31, 2010) 57a

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice:	Justices:
	Marilyn Kelly	Michael F. Cavanagh
		Elizabeth A. Weaver
		Maura D. Corrigan
		Robert P. Young, Jr.
		Stephen J. Markman
		Diane M. Hathaway

FILED JULY 13, 2010

STATE OF MICHIGAN
SUPREME COURT

No. 137993

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, Deceased,

Plaintiff-Appellant,

v

MARK RASAK D.O.,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

We granted leave to consider whether the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.*, permits ex parte interviews by defense counsel with treating physicians under a qualified protective order. We hold that ex parte interviews, which are permitted under Michigan law, are also consistent with HIPAA regulations, provided that "reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B). Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEEDINGS

The Court of Appeals summarized the relevant facts and trial court proceedings:

> Plaintiff filed this wrongful-death medical-malpractice action alleging that defendant had failed to properly diagnose or treat plaintiff's decedent, Linda Clippert, thereby proximately causing her death. Defendant sought to interview Clippert's treating physician, but plaintiff refused to waive Clippert's confidentiality rights under the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* Plaintiff signed a waiver allowing the release of medical records, but refused to provide a release for oral communications. Defendant moved for a qualified protective order to permit an ex parte

> interview with Clippert's treating physician, but the circuit court denied the motion. The court concluded that "the HIPAA provision relative to a protective order only . . . pertains to documentary evidence" and "that HIPAA does not authorize ex parte oral interviews." [*Holman v Rasak*, 281 Mich App 507, 508; 761 NW2d 391 (2008).]

The Court of Appeals granted defendant's application for leave to appeal and concluded that defense counsel may conduct an ex parte interview with a plaintiff's treating physician "if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place." *Id.* at 513. The Court "agree[d] with plaintiff that HIPAA supersedes Michigan law to the extent that its protections and requirements are more stringent than those provided by state law," but disagreed with the trial court's conclusion "that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA." *Id.* at 511-512. It reasoned that the relevant HIPAA regulation, 45 CFR 164.512(e)(1)(ii), does not exclude oral communication from the regulations governing disclosure of protected health information. *Id.* at 512. Moreover, "45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 CFR 164.512(e)(2) makes clear that the regulations concerning qualified protective orders 'do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.'" *Id.*, quoting 45 CFR 164.512(e)(2). The panel also rejected plaintiff's argument that defendants may rely on written medical records and conduct depositions if more information is

required. It quoted this Court's observation in *Domako v Rowe*, 438 Mich 347, 361; 475 NW2d 30 (1991), that informal interviews are "'routine practice'" and that "'[t]here is no justification for requiring costly depositions . . . without knowing in advance that the testimony will be useful.'" *Holman*, 281 Mich App at 512-513. The panel reversed the trial court's order and remanded for further proceedings.

We granted plaintiff's application for leave to appeal to consider whether HIPAA permits defense counsel to seek ex parte interviews with a plaintiff's treating physicians.

II. HIPAA

Congress enacted the Health Insurance Portability and Accountability Act in 1996. HIPAA provided that if Congress did not enact "legislation governing standards with respect to the privacy of individually identifiable health information within 36 months after HIPPA was enacted," the Secretary of Health and Human Services would be required to "promulgate final regulations containing such standards . . . ." PL 104-191, § 264(c)(1), 110 Stat 2033. Pursuant to that legislative mandate, 45 CFR 164.502(a) provides that "[a] covered entity may not use or disclose protected health information, except as permitted or required by this subpart . . . ."[1]

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[1] Additionally, the Department of Health and Human Services (HHS), the federal agency charged with administering HIPAA, has provided the following gloss on its role under HIPAA:

> The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, was enacted on

"[C]overed entity" means: (1) "[a] health plan"; (2) "[a] health care clearinghouse," or (3) "[a] health care provider who transmits any health information in electronic form in connection with a transaction" for which the Department of Health and Human Services (HHS) has adopted standards under HIPAA. 45 CFR 160.103. With exceptions not relevant here, "protected health information" means "individually identifiable health information" transmitted by or maintained in electronic media or "[t]ransmitted or maintained in any other form or medium." 45 CFR 160.103. "Health

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August 21, 1996. Sections 261 through 264 of HIPAA require the Secretary of HHS to publicize standards for the electronic exchange, privacy and security of health information. Collectively these are known as the *Administrative Simplification* provisions. HIPAA required the Secretary to issue privacy regulations governing individually identifiable health information, if Congress did not enact privacy legislation within three years of the passage of HIPAA. Because Congress did not enact privacy legislation, HHS developed a proposed rule and released it for public comment on November 3, 1999. . . . The final modifications were published in final form on August 14, 2002. [U.S. Dept. of Health and Human Services, Office for Civil Rights, Summary of the HIPAA Privacy Rule at 1-2 ("HHS Summary") (footnotes omitted). Available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (accessed May 14, 2010.)]

The HIPAA "Privacy Rule" promulgated by the HHS Secretary "establishes . . . a set of national standards for the protection of certain health information." *Id.* at 1. "The Privacy Rule standards address the use and disclosure of individuals' health information—called 'protected health information' by organizations subject to the Privacy Rule—called 'covered entities,' as well as standards for individuals' privacy rights to understand and control how their health information is used." *Id.*

information" includes both "oral" information and information that is "recorded in any form or medium . . . ." *Id.* "Individually identifiable health information"

> is information that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) [i]s created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) [t]hat identifies the individual; or
>
> (ii) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual. [*Id.*]

Thus, "protected health information" is any health information, oral or recorded, that is individually identifiable and transmitted or maintained by a covered entity in any form or medium. 45 CFR 160.103.[2]

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[2] See also HHS Summary, *supra* at 3, citing 45 CFR 160.103 ("The Privacy Rule protects all '*individually identifiable health information*' held or transmitted by a covered entity or its business associate, in any form or media, whether electronic,

III. STANDARD OF REVIEW

Although a trial court's decision on a motion regarding discovery is reviewed for an abuse of discretion, *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003), this case presents questions of statutory interpretation, which we review de novo as questions of law, *In re Investigation of March 1999 Riots*, 463 Mich 378, 383; 617 NW2d 310 (2000).

IV. ANALYSIS

Under Michigan law, defense counsel in a medical malpractice action is permitted to seek an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege with respect to that physician. *Domako*, 438 Mich at 361. MCL 600.2157 establishes the physician-patient privilege and also sets forth the rule on waiver of the privilege. It provides, in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. *If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a*

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paper, or oral. The Privacy Rule calls this information '*protected health information (PHI).*'").

physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. [Emphasis added.]

In *Domako*, 438 Mich at 361, we explained that

> "[N]o party to litigation has anything resembling a proprietary right to any witness's evidence. *Absent a privilege no party is entitled to restrict an opponent's access to a witness . . . .*" While we recognize that the physician is different from an ordinary witness as a result of the confidential nature of the physician's potential testimony, that confidentiality is adequately preserved by the physician-patient privilege. *Once the privilege is waived, there are no sound legal or policy grounds for restricting access to the witness.* [*Domako*, 438 Mich at 361, quoting *Doe v Eli Lilly & Co*, 99 FRD 126, 128 (D DC, 1983) (emphasis added).]

With respect to ex parte interviews, we explained:

> Although the rules are silent on informal methods of discovery, *prohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation.* The omission of interviews from the court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive. See

> MCR 2.302(F)(2) (permitting parties to modify the court rules to use other methods of discovery). *Their absence from the court rules does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to coöperate.* [*Domako*, 438 Mich at 361-362.]

After we decided *Domako*, the Legislature enacted MCL 600.2912f,[3] which provides that a defendant in a

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[3] MCL 600.2912f, which became effective April 1, 1994, provides:

> (1) A person who has given notice under [MCL 600.2912b] or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by [MCL 600.2157] and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.
>
> (2) Pursuant to subsection (1), a person or entity who has received notice under [MCL 600.2912b] or who has been named as a defendant in an action alleging medical malpractice or that person's or entity's attorney or authorized representative may communicate with a person specified in [MCL 600.5838a] in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.
>
> (3) A person who discloses information under

medical malpractice action or the defendant's attorney or representative "may communicate" with persons or entities with respect to whom the plaintiff has waived the physician-patient privilege "in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action." MCL 600.2912f(2). The statute also makes clear that a person who discloses such information "does not violate [MCL 600.2157] or any other similar duty or obligation created by law and owed to the claimant or plaintiff." MCL 600.2912f(3).

Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510. 45 CFR 164.512, however, enumerates several specific situations in which "[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR] 164.510

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subsection (2) to a person or entity who has received notice under [MCL 600.2912b] or to a person or entity who has been named as a defendant in an action alleging medical malpractice or to the person's or entity's attorney or authorized representative does not violate [MCL 600.2157] or any other similar duty or obligation created by law and owed to the claimant or plaintiff.

. . . ." 45 CFR 164.512.[4] This regulation provides alternative requirements for disclosures in specific situations. Relevant here is paragraph (e), "[d]isclosures for judicial and administrative proceedings," which permits a covered entity to disclose protected health information in response to "an order of a court or administrative tribunal," or "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:"

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[4] The dissent concludes that the introductory paragraph of 45 CFR 164.512, and the second sentence in particular, "specifically limits when a covered entity may disclose protected health information *orally*[.]" We respectfully disagree. The paragraph provides, in full:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.* [Emphasis added.]

The purpose of the introductory paragraph is to explain that, for the uses and disclosures described in the lettered subsections of 45 CFR 164.512, the general requirements of a "written authorization of the individual as described in § 164.508" and "the opportunity for the individual to agree or object as described in § 164.510" need not be met. The second sentence explains how the covered entity may *inform* the individual of the use or disclosure when required to do so, and how the individual may *agree* to the use or disclosure. This introductory paragraph does not govern the form of a *use or disclosure* of *protected health information*.

> (A) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [45 CFR 164.512(e)(1)(i) and (ii).][5]

A "qualified protective order" is an order of a court or administrative tribunal or a stipulation by the parties that:

> (A) [p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

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[5] Alternatively, "a covered entity may disclose protected health information in response to lawful process described in [45 CFR 164.512(e)(1)(ii)] without receiving satisfactory assurance . . . if the *covered entity* makes reasonable efforts . . . to seek a qualified protective order sufficient to meet the requirements of [45 CFR 164.512(e)(1)(iv)]." 45 CFR 164.512(e)(1)(vi) (emphasis added).

> (B) [r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. [45 CFR 164.512(e)(1)(v).]

Under HIPAA, "[a] standard, requirement, or implementation specification" of HIPAA "that is *contrary* to a provision of State law preempts the provision of State law" unless, among other exceptions, "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under" HIPAA. 45 CFR 160.203 (emphasis added). "Contrary" means either that "[a] covered entity would find it impossible to comply with both the State and federal requirements" or that "[t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA. 45 CFR 160.202. "More stringent," in this context, means "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 CFR 160.202.

We hold that HIPAA does not preempt Michigan law permitting ex parte interviews because Michigan law is not "contrary" to HIPAA under either definition of that term. Michigan law is not "contrary" to HIPAA under the first definition because it is possible for a covered entity to comply with both Michigan law and HIPAA. As the parties acknowledge, HIPAA contains no express mention of ex parte interviews. Thus, the New York Court of Appeals has concluded that New York law permitting ex parte interviews and HIPAA

could coexist because HIPAA "merely superimposed procedural requirements" onto state law:

> In addition, HHS has pointedly advised that where "there is a State provision and no comparable or analogous federal provision, or the converse is the case," there is no possibility of preemption because in the absence of anything to compare "there cannot be . . . a 'contrary' requirement" and so "the stand-alone requirement—be it State or federal—is effective" (64 Fed Reg 59918, 59995). As a result, there can be no conflict between New York law and HIPAA on the subject of ex parte interviews of treating physicians because HIPAA does not address this subject. *Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites.* As a practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order. [*Arons v Jutkowitz*, 9 NY3d 393, 415; 880 NEwd 831; 850 NYS2d 345 (2007) (emphasis added).]

We agree with the *Arons* court's analysis. Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them. Because it is possible for defense counsel to insure that any disclosure of protected health information by the covered entity complies with 45 CFR 164.512(e) by

making "reasonable efforts" to obtain a qualified protective order, HIPAA does not preempt Michigan law concerning ex parte interviews.

Plaintiff raises several arguments in support of her position that 45 CFR 164.512(e) does not permit ex parte interviews. First, she claims that HIPAA does not authorize informal discovery and that its provision for disclosure of protected health information pursuant to a qualified protective order applies only when a party seeks protected health information in the context of formal discovery. We disagree. Under 45 CFR 164.512(e)(1)(ii), a covered entity is permitted to "disclose protected health information in the course of any judicial or administrative proceeding":

> (ii) [i]n response to a *subpoena, discovery request, or other lawful process* that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of

> paragraph (e)(1)(v) of this section. [Emphasis added.]

As previously discussed, ex parte interviews are permitted under Michigan law as a means of informal discovery. Thus, even if "discovery request" contemplates formal discovery, a request for an ex parte interview is at least "other lawful process" within the meaning of 45 CFR 164.512(e)(1)(ii). Therefore, as long as "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order" that meets the requirements of subsection (e)(1)(v), disclosure of protected health information by a covered entity during an ex parte interview is consistent with both Michigan law and HIPAA. The HIPAA regulations were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information." 65 Fed Reg 82462-01, 82530 (December 28, 2000), discussing 45 CFR 164.512(e).[6]

Plaintiff and the dissent also argue that an ex parte interview is not a proper subject of a qualified protective order because 45 CFR 164.512(e)(1)(v)(B)

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[6] Other jurisdictions, which, like Michigan, permitted ex parte interviews before HIPAA, are in accord in determining that HIPAA did not disrupt state law practice and that this type of informal discovery request is permitted under HIPAA. See, e.g., *Arons, supra*; *Reutter v Weber*, 179 P3d 977 (Colo, 2007); *Holmes v Nightingale*, 2007 OK 15; 158 P3d 1039 (Okla, 2007); *Smith v American Home Prod Corp*, 372 NJ Super 105; 855 A2d 608 (NJ Super, 2003).

requires the "return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." Plaintiff argues that this provision thus contemplates that only "documentary" evidence will be the subject of a qualified protective order.[7] We disagree. The distinction plaintiff makes between "documentary" information and other types of information is not one that exists in HIPAA. As previously discussed, "health information" explicitly includes "oral information," and all individually identifiable health information transmitted or maintained in any form or medium is "protected health information" under HIPAA. 45 CFR 160.103. We see no logical reason that "protected health information" maintained in a physician's records and conveyed verbally by a physician during an ex parte interview cannot be the subject of a qualified protective order under 45 CFR 164.512(e)(1)(v). The requirement in subsection (e)(1)(v)(B) to return or destroy "protected health information" applies to *all* protected health information, as the term is defined under HIPAA and its regulations.

Moreover, plaintiff's argument proceeds from the assumption that an ex parte interview never generates a physical record. This is simply incorrect. For instance, if the ex parte interview is conducted orally, a recording of the conversation could be produced. Alternatively, defense counsel and a physician might choose to conduct an ex parte interview via e-mail. And

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[7] The dissent apparently agrees. It observes that "[a] verbal ex parte interview cannot be returned or destroyed at the conclusion of the litigation."

written documents may be exchanged at an ex parte interview. All of these records could be "returned" or "destroyed," thus making the requirement of 45 CFR 164.512(e)(1)(v)(B) applicable, and defeating the argument that a qualified protective order cannot be fashioned for an ex parte interview under the plain meaning of the statute.

Plaintiff also argues that 45 CFR 164.512(e) does not allow ex parte interviews because defense counsel does not particularize the specific health information being sought in the interview, and that ex parte interviews lack adequate protections and limitations on the scope of disclosure. She argues that 45 CFR 164.512(e) "presumes that the parties are aware of the [protected health information] that has been requested **before** entry of a qualified protective order." (Plaintiff's Reply Brief, pp 1-2.) She relies on the following language from 45 CFR 164.512(e)(1)(v): "'For purposes of paragraph (e)(1) of this section, a qualified protective order means, **with respect to protected health information requested under paragraph (e)(1)(ii) of this section**, an order of the court . . . .'" (Emphasis added by plaintiff.) 45 CFR 164.512(e)(1)(ii), however, makes no reference to a request for *specific* health information. It simply provides that a covered entity may disclose protected health information "[i]n response to a subpoena, discovery request, or other lawful process" if the other requirements of the section are met. This is in contrast to 45 CFR 164.512(e)(1)(i), which permits disclosure in response to a court order, "*provided that the covered entity discloses only the protected health information expressly authorized by such order*[.]" (Emphasis added.)

Accordingly, we conclude that Michigan's approach to informal discovery, which permits defense counsel to seek an ex parte interview with a plaintiff's treating physician, is not "contrary" to HIPAA. An ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B).[8]

Nor does Michigan law concerning ex parte interviews "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA—the second definition of "contrary" under 45 CFR 160.202. Plaintiff claims that allowing ex parte interviews frustrates HIPAA's purpose of protecting the privacy of an individual's health information. While HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of all other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations. Thus, a covered entity may disclose protected health information: (1) to "[a]

---

[8] The "reasonable efforts" language comes directly from 45 CFR 164.512(e), which unquestionably governs disclosures of protected health information for judicial or administrative proceedings. We disagree with the dissent's unsupported assertion that 45 CFR 164.512(e) is "only applicable if there is a corresponding judicial or administrative procedure available under state law or court rule." The dissent would apparently hold that 45 CFR 164.512(e) is not "applicable" in Michigan under any circumstances.

public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability," 45 CFR 164.512(b)(i); (2) to an employer, if "[t]he covered entity is a covered health care provider who is a member of the workforce of such employer or who provides health care to the individual at the request of the employer" in order "[t]o evaluate whether the individual has a work-related illness or injury," 45 CFR 164.512(b)(v)(A)(2); (3) "to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions," 45 CFR 164.512(d)(1); and (4) "to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities authorized by the National Security Act," 45 CFR 164.512(k)(2). Given HIPAA's interest in balancing the need for disclosure in certain contexts with the importance of individual privacy, we cannot conclude that ex parte interviews are "contrary" to the objectives of HIPAA, as long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e). Because we conclude that HIPAA does not preempt state law, we affirm the judgment of the Court of Appeals.

Finally, we emphasize that while we have been asked in this case to decide whether HIPAA permits defense counsel to seek an ex parte interview with a plaintiff's treating physician, 45 CFR 164.512(e)(1) is directed at covered entities, not parties or trial courts. HIPAA does not require a trial court to grant a motion for a protective order. Therefore, a trial court retains

its discretion under MCR 2.302(C)[9] to issue protective orders and to impose conditions on ex parte interviews.[10]

---

[9] MCR 2.302(C) provides in relevant part:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court[.]

[10] A trial court's decision on a motion for a protective order is reviewed for an abuse of discretion. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 151; 715 NW2d 398 (2006). Because we have determined that ex parte interviews can be the subject of a qualified protective order under HIPAA, where, as here, a trial court bases its denial of such a motion on the erroneous conclusion that such interviews are not allowed under HIPAA, its decision constitutes an abuse of discretion because it falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Similarly, 45 CFR 164.512(e)(1) addresses the circumstances under which a covered entity *may* disclose protected health information. Nothing in that provision, or in Michigan law, *requires* a covered entity to consent to an ex parte interview or to disclose protected health information during such an interview. See *Domako*, 438 Mich at 362 ("[T]here is nothing in the court rules precluding an interview if the physician chooses to coöperate."). As one commenter pointed out, "[t]he breadth of HIPAA and the substantial repercussions for HIPAA violations undoubtedly will cause healthcare providers to think twice before agreeing to ex parte interviews, even if defense counsel has a strong argument that HIPAA should not apply." Comment, *Don't ask, don't tell: HIPAA's effect on informal discovery in products liability and personal injury cases*, 2006 BYU L Rev 1075, 1098.

V. CONCLUSION

Under Michigan law, nothing precludes defense counsel from seeking an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege. Michigan law is not "contrary" to HIPAA within the first definition of that term under 45 CFR 160.202 because, under HIPAA, a covered entity may disclose protected health information during an ex parte interview if "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B); see also 45 CFR 160.202. Nor does Michigan law concerning ex parte interviews "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA—the second

meaning of "contrary" under 45 CFR 160.202—given the balance HIPAA strikes between the protection of individual privacy and the necessity of disclosure in some contexts. Thus, HIPAA does not preempt Michigan law concerning ex parte interviews. Nothing in either HIPAA or Michigan law, however, *requires* a covered entity to agree to an informal ex parte interview with defense counsel, or to disclose protected health information during such an interview.

Accordingly, the trial court abused its discretion by denying defendant's request for a qualified protective order on the grounds that HIPAA precludes ex parte interviews. The result reached by the Court of Appeals is affirmed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

KELLY, C.J., and CAVANAGH, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

STATE OF MICHIGAN
SUPREME COURT

No. 137993

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, Deceased,	)
Plaintiff-Appellant,	)
v	)
MARK RASAK D.O.,	)
Defendant-Appellee.	)

WEAVER, J. (*dissenting*).

Although I understand the merits of the arguments presented by both the majority and Justice HATHAWAY's dissent, at this time and in this particular case, I am more persuaded by the reasoning and result of the dissent.

Elizabeth A. Weaver

STATE OF MICHIGAN
SUPREME COURT

No. 137993

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, Deceased,	)
Plaintiff-Appellant,	)
v	)
MARK RASAK D.O.,	)
Defendant-Appellee.	)

HATHAWAY, J. (*dissenting*).

The majority holds that an ex parte interview can be conducted under MCR 2.302(C) in a manner that is consistent with the Health Insurance Portability and Accountability Act (HIPAA),[1] provided that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) as set forth in 45 CFR 164.512(e)(1)(ii)(B). I must respectfully dissent from this decision.

First, ex parte interviews are generally conducted orally. The introductory portion of 45 CFR 164.512

[1] 42 USC 1320d *et seq*. References to "HIPAA" may include the regulations promulgated under that statute.

specifically limits *oral* disclosures of a covered entity's information to instances "[w]hen the covered entity is *required by this section* to inform the individual of, *or when the individual may agree to*, a use or disclosure permitted by this section . . . ." (Emphasis added.) Because an ex parte interview is not required and cannot be compelled by this section or under Michigan law, nor is there a requirement within 45 CFR 164.512(e) that a patient be informed of an ex parte interview in a judicial proceeding, and plaintiff has not agreed to the ex parte interview in this instance, the provisions of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing an ex parte interview that involves the oral disclosure of health information.

Second, I also disagree with the majority's conclusion that Michigan law authorizing ex parte interviews is valid and enforceable after the adoption of HIPAA. First, the physician-patient waiver provisions of both MCL 600.2157 and MCL 600.2912f are preempted by HIPAA, because they are contrary to and not more stringent than HIPAA. Second, the majority errs in its reliance on *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991), to support ex parte interviews. While *Domako* was a thoughtful and well reasoned opinion at the time, it relies on MCL 600.2157 and provisions of the Michigan Court Rules that embody that statute. That statute is now preempted by HIPAA. I conclude that ex parte interviews are not allowed in Michigan because HIPAA does not specifically authorize ex parte interviews, and the court rules and statutes relied on to authorize the interviews have been preempted.

Finally, even assuming that an ex parte interview was a permitted oral disclosure under 45 CFR 164.512(e), the majority opines that a party is *only* required to make *reasonable efforts* to obtain a qualified protective order rather than *actually* having to obtain a court order. In so holding, the majority fails to recognize that 45 CFR 164.512(e) applies to judicial and administrative proceedings, and that provisions of this subsection are only applicable if there is a corresponding judicial or administrative procedure available under state law or court rule. This medical malpractice action is being pursued in a circuit court, rather than in an administrative proceeding, and as such is subject to our court rules. Under our court rules, there is no mechanism for a party to only make a *reasonable effort* to obtain a court order. Under the Michigan Court Rules, a party must make a request for an order by motion, and the request is either granted or denied. Under the majority's analysis, only a reasonable effort to secure the order is required, which can only mean that the request could be incompletely made or denied altogether and an ex parte interview could still take place. The majority's analysis and conclusion are completely at odds with our court rules and undermine the authority of trial courts to enforce the court rules and their own orders. Thus, the majority errs by relying on an inapplicable HIPAA provision to support its analysis, and I cannot agree with such an interpretation.

Accordingly, I would vacate the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. HIPAA

HIPAA was enacted in 1996 to provide a minimum national standard for the protection of private health information. HIPAA was intended to be a shield to protect private medical information from disclosure to third parties. HIPAA is a complex and comprehensive regulatory scheme. This overview is only intended to provide the necessary background to address those HIPAA regulations that deal with judicial proceedings and ex parte communications.

HIPAA provides an all-encompassing umbrella that protects the confidentiality of patient health information. HIPAA regulations specify that a *covered entity may not use or disclose* protected health information, *except as permitted or required under the act*. 45 CFR 164.502(a). Under its broad definitions, a *covered entity* includes a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a covered transaction. 45 CFR 160.103. *Health Information* includes both oral information as well as information that is recorded in any form or medium that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse. *Id*. *Individually identifiable health information* includes any information that relates to the past, present, or future physical or mental health or condition of an individual, or the past, present, or future provision of or payment for the provision of health care to an individual; and either identifies the individual, or provides a reasonable basis to believe the information can be used to identify the individual. *Id*. In sum, HIPAA's umbrella covers any health

information, oral or recorded, that is individually identifiable and transmitted or maintained by a covered entity in any form or medium *unless a specific requirement or exception is found in the act* that provides for release of the protected information.

Finally, any HIPAA standard or requirement that is *contrary* to state law *preempts* state law, unless the state law is *more stringent* than HIPAA. 45 CFR 160.203. *Contrary* means either that a covered entity would find it impossible to comply with both the state and federal requirements or that the provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. 45 CFR 160.202. *More stringent* means that the state law provides greater privacy protection than HIPAA. 45 CFR 160.202.

II. HIPAA AND JUDICIAL PROCEEDINGS

HIPAA contains narrowly tailored exceptions for disclosures of protected health information during judicial or administrative proceedings. See 45 CFR 164.512(e). While HIPAA carves out certain areas of the law, such as worker's compensation, for individualized treatment,[2] HIPAA does not contain a

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[2] Compare and contrast HIPAA's treatment of workers' compensation claims, which provides for a more expansive method of disclosure than is allowed in the general category for judicial proceedings. No comparable section exists for medical malpractice claims. Section 164.512(l) provides:

> *Standard: Disclosures for workers' compensation.* A covered entity may disclose protected health information as authorized by and to the extent necessary to comply

separate section applicable only to medical malpractice claims. Nor does HIPAA impose more or less protection of health information for persons bringing medical malpractice claims, and thus medical malpractice claims are bound by the terms and conditions of 45 CFR 164.512(e) governing judicial proceedings. In judicial proceedings, absent a validly executed HIPAA compliant authorization as mandated by 45 CFR 164.508, a covered entity may only disclose health information according to the specific terms and conditions set forth in 45 CFR 164.512(e).

HIPAA does not address or mention ex parte interviews. The majority opines that because ex parte interviews are not mentioned in HIPAA, they are not contrary to HIPAA, and are thus authorized. I believe this analysis and conclusion are in error. HIPAA only allows for the release of information pursuant to a specifically enumerated requirement or exception. 45 CFR 164.502(a). If no requirement or exception exists, disclosure is not allowed. *Id.*

The majority also suggests that HIPAA draws no distinction between when a covered entity's information needs to be disclosed in documentary form and when the disclosure can be made orally. To the contrary, 45 CFR 164.512 does make this distinction. While the majority relies on 45 CFR 164.512 to authorize *oral* ex parte interviews, they fail to address its introductory portion, which specifically limits when

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with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

a covered entity may disclose protected health information *orally*:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.* [45 CFR 164.512 (emphasis added).]

As this plain language indicates, oral disclosures are allowed, but are limited to "[w]hen the covered entity is *required by this section to inform* the individual of, or *when the individual may agree to*, a use or disclosure permitted by this section, *the covered entity's information* and the individual's agreement *may be given orally*." *Id.* (emphasis added). This introductory language contains *limited* circumstances wherein oral disclosures of information are permitted. If the circumstance is not provided for by that language, oral disclosure of information is not allowed. I respectfully suggest that the majority errs in its analysis, because neither of the specific circumstances applicable to use or disclosure of the covered entity's information is present in this instance. Ex parte interviews can not be required by this section or Michigan law, nor is there a requirement within 45 CFR 164.512(e) that a patient be informed of an ex

parte interview in a judicial proceeding. Additionally, the ex parte interview was not agreed to in this instance. Accordingly, the two subsections of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing ex parte interviews, because the very terms of the introductory language of that section does not allow for oral disclosures.[3]

However, even if the introductory language limiting oral disclosures didn't exist, the majority's reliance on 45 CFR 164.512(e)(1)(ii)(B)[4] would be troubling. Subsection 164.512(e)(1)(ii)(B) permits disclosure "[i]n response to a subpoena, discovery request, or other lawful process, *that is not accompanied by an order of a court* or administrative tribunal, *if*":

> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [Emphasis added.]

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[3] Compare and contrast an ex parte interview with a deposition, which can be conducted consistently with 45 CFR 164.512(e) because depositions are a recognized procedure under our court rules which are not only required but can be compelled. Moreover, depositions meet all of the notice provisions of the subsection.

[4] This subsection requires that reasonable efforts be made to secure a protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).

This subsection, by its very terms, contemplates the use of state law procedures that occur *without the need for a court order*. Consistent with the mandates of this subsection the majority opines that a party is only required to make *reasonable efforts* to obtain a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) rather than *actually* having to obtain a court order. In so holding, the majority fails to recognize that subsection 164.512(e) applies to judicial and administrative proceedings, and that its provisions are only applicable if there is a corresponding judicial or administrative procedure available under state law or court rule. This medical malpractice action is being pursued in a circuit court rather than in an administrative proceeding, and as such is subject to our Michigan Court Rules. Under our court rules, there is no mechanism for a party to *only* make a *reasonable effort* to obtain a court order. MCR 2.119(A)(1) requires a request for an order to be made by motion, and the motion is either granted or denied. Query, what does the majority contemplate when it proposes that only a reasonable effort need be ma le to obtain an order in a circuit court? The majority's "reasonable efforts" analysis can only mean that a request could be incompletely made, or denied by the trial court altogether, and an interview could still take place. Either of these results would be absurd. This analysis and conclusion are completely at odds with our court rules and completely undermine the authority of trial courts to enforce the court rules, or even their own orders.

I think it is clear that the majority errs by relying on an inapplicable HIPAA provision to support its analysis, and I cannot agree with such an interpretation. When interpreting § 164.512, it must

be understood that this subsection of provision of HIPAA regulation applies not only to courts, but also to every federal agency, including those that administer Medicare, Medicaid, veterans' benefits, and Social Security, to name a few. Most of these federal agencies do not have ready access to circuit court judges who can issue or deny orders. Using a provision that is obviously designed for an administrative proceeding in a judicial proceeding leads to an absurd result. "[S]tatutes must be construed to prevent absurd results . . . ." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

The majority's reliance on § 164.512(e)(1)(v) is equally troubling. Again, even if the prefatory section limiting oral disclosures did not exist, the majority's conclusion that § 164.512(e)(1)(v) may be used because it permits disclosure pursuant to a *qualified protective order* issued by a court or administrative tribunal or a stipulation by the parties is similarly erroneous. This provision "*[r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.*" 45 CFR 164.512(e)(1)(v)(B) (emphasis added). A verbal ex parte interview cannot be returned or destroyed at the conclusion of the litigation. The fact that an interview *could be* recorded or memorialized, thus creating something that could be returned or destroyed, does not resolve the analytical problem as the majority suggests. HIPAA's return-or-destroy provision is *mandatory* and *not permissive*, and we are not free to rewrite HIPAA's mandates; we are required to follow them.

Further, to support its analysis, the majority borrows the phrase *oral information* from the broad

definition of what is covered by HIPAA and uses it to expand this narrowly tailored exception to justify its interpretation. I must respectfully disagree with this premise and the methodology used to come to the conclusion. What is protected by HIPAA is not the same as what is excepted. What is protected by HIPAA is vast; the exceptions are specific and narrowly tailored. Disclosure is only allowed if *permitted or required under the act*, 45 CFR 164.502(a), and, again, we are not free to rewrite HIPAA's mandates; we are required to follow them.

III. MICHIGAN STATUTES

It is also necessary to review Michigan law to determine whether ex parte interviews are allowable under any statute or court rule in a manner that is consistent with HIPAA's provisions which allow for *oral* disclosures.[5] This inquiry begins with a review of applicable Michigan medical malpractice statutes to determine if the statutes are enforceable or if they are preempted by HIPAA. State law is preempted by HIPAA if the state law is contrary to HIPAA, meaning that a covered entity would find it impossible to simultaneously comply with the federal and state law and the state law is not more stringent than HIPAA. 45 CFR 160.202.

Two statutory provisions, MCL 600.2157 and MCL 600.2912f, provide for the waiver of privilege in the context of medical malpractice actions. The relevant

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[5] This opinion addresses *oral* disclosures only, and does not opine on disclosure of health information in *written* documentary form.

language of MCL 600.2157 is contained in its second sentence, which provides:

> *If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness* in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, *the patient shall be considered to have waived the privilege provided in this section* as to another physician who has treated the patient for the injuries, disease, or condition. [Emphasis added.]

The unambiguous language of this provision clearly indicates that the physician-patient privilege is waived by virtue of two triggering events: (1) *filing* a lawsuit for personal injury or malpractice, and (2) *producing a physician as a witness* in the patient's own behalf. Once those two triggering events occur, nothing more is required by the statute and the privilege is waived. The statute does not require compliance with HIPAA to release or compel production of the health information. Rather, by virtue of the two triggering events alone, waiver occurs and the information may be released or compelled.

Under HIPAA, all health care information is protected by its umbrella *unless* it is specifically exempted. Release of information in judicial proceedings under HIPAA is controlled by 45 CFR 164.512(e). However, the exceptions contained within this section are specific and narrowly tailored. Significantly, none of the specific and narrowly tailored exceptions within § 164.512(e) allows for

release of information by virtue of the mere occurrence of the two triggering events named in MCL 600.2157, filing and production of a witness. Thus, the second sentence of MCL 600.2157 is *contrary* to HIPAA because *contrary* means that a covered entity would find it impossible to comply with both the Michigan and HIPAA requirements, or that the provision of Michigan law stands as an obstacle to the accomplishment and full purposes and objectives of HIPAA. A covered entity cannot simultaneously comply with the second sentence of § 2157 and HIPAA.

Moreover, the second sentence of § 2157 is clearly *not more stringent* in its requirements than HIPAA because *more stringent* means that the state law provides greater privacy protection for the individual who is the subject of the individually identifiable health information. 45 CFR 160.202. The second sentence of § 2157 simply does not provide a patient with greater privacy protection; to the contrary, it provides less. Accordingly, by the very terms and conditions set forth in HIPAA, the second sentence of § 2157. which provides for waiver, is preempted.

MCL 600.2912f must also be reviewed to determine whether any of its provisions are also preempted by HIPAA. I conclude that § 2912f is preempted *in its entirety* because it too is contrary to and not more stringent than HIPAA. MCL 600.2912f provides in pertinent part:

> (1) *A person who has given notice under [MCL 600.2912b]* or who has commenced an action alleging medical malpractice *waives for purposes of that claim or action the privilege created by [MCL 600.2157] and any other*

> *similar privilege created by law* with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.
>
> (2) Pursuant to subsection (1), *a person or entity who has received notice under [MCL 600.2912b] or who has been named as a defendant* in an action alleging medical malpractice or that person's or entity's attorney or authorized representative *may communicate with a person specified in [MCL 600.5838a] in order to obtain all information relevant to the subject matter of the claim* or action and to prepare the person's or entity's defense to the claim or action. [Emphasis added.]

This statute provides that the physician-patient privilege is waived once a notice of intent (NOI) is provided pursuant to MCL 600.2912b. Section 2912f, once again, does not require that release of protected health care information be contingent upon compliance with HIPAA by such means as providing the covered entity with a HIPAA compliant authorization or a court order compelling production. Waiver is triggered in this instance by the mere act of sending or receiving an NOI. Nothing more is required. Subsection 164.512(e), which covers disclosure during judicial and administrative proceedings, does not have an exception for disclosure by virtue of an NOI being provided to a

defendant in and of itself.[6] HIPAA provides narrowly tailored methods of release, none of which are similarly required by § 2912f. As HIPAA contains no exception by virtue of providing an NOI, this entire statute is contrary to HIPAA because a covered entity would find it impossible to comply with both the Michigan and HIPAA requirements, and this statute would stand as an obstacle to the accomplishment and full purposes and objectives of HIPAA. A covered entity cannot comply with the second sentence of § 2912f and HIPAA, and § 2912f is clearly not more stringent in its requirements than HIPAA. Section 2912f does not provide greater privacy protection for the individual who is the subject of the individually identifiable health information; to the contrary, it provides less.

This interpretation of § 2157 and § 2912f recognizes that HIPAA protects *all* health care information in any form and that *if and only if* there is a specifically enumerated exception in HIPAA are its provisions waived. HIPAA contains no provision that permits waiver of privilege by the mere act of *filing* a medical malpractice action or sending an NOI, and we are not free to write such an exception into the federal act. If HIPAA did contain such an exception, all one would need to do is give a copy of the complaint or an NOI to a covered entity and ask that it release the requested information. Obviously, no one contemplates this as the procedure; however, that is precisely all these two statutes require. Accordingly, I conclude that the

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[6] The medical malpractice NOI waiting period is found in MCL 600.2912b.

second sentence of § 2157 and all of § 2912f are preempted by HIPAA and are not enforceable.

IV. *DOMAKO* AND THE MICHIGAN COURT RULES

Finally, it is also necessary to review *Domako* and our court rules to determine whether ex parte interviews can be conducted consistently with HIPAA's provisions which allow for *oral* disclosures. In *Domako*, this Court reviewed both § 2157 and our court rules to determine whether ex parte interviews were permissible. *Domako* found equally compelling support for allowing ex parte interviews in both sources. The Court opined:

> The statute provides protection for information relayed by the patient to the physician, and it also provides for a waiver of the privilege when the plaintiff "produce[s] any physician as a witness in his own behalf" in a malpractice action. *Similarly, the Michigan Court Rules offer protection for medical information*:
>
> "When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under MCR 2.310 to the extent that . . . the party does not assert that the information is subject to a valid privilege." [MCR 2.314(A)(1)(b).]
>
> *Just as in the privilege statute, the court rules provide for the waiver of the physician-patient privilege.* MCR 2.314(B)(1) clarifies the procedure by which the patient waives the

> privilege: "The privilege must be asserted in the party's written response under MCR 2.310. A privilege not timely asserted is waived in that action . . . ." The Staff Comment declares that this section requires a party to decide at the discovery stage whether to assert the privilege. *Unlike other forms of litigation, a case involving medical malpractice cannot proceed without evidence of the physical or mental condition of the plaintiff. Therefore, requiring the plaintiff to decide whether to assert the privilege at the discovery stage, rather than at trial, promotes efficient use of judicial resources by fostering an early resolution of this issue.*[7] [Emphasis added.]

As previously indicated, § 2157 has been preempted by HIPAA, and that portion of the *Domako* analysis is no longer valid. Accordingly, the only remaining question is whether *Domako*'s court rule analysis has continuing validity, and I conclude that it does not, despite the fact that *Domako* was a thoughtful and well reasoned opinion.

Domako reasoned that ex parte interviews were permissible under our court rules because *"[j]ust as in the privilege statute, the court rules provide for the waiver of the physician-patient privilege . . . [a] privilege not timely asserted is waived in that action . . . ."* *Domako*, 438 Mich at 354 (emphasis added). This analysis is fundamentally premised on the concept that inaction waives the privilege. However, privileges cannot be waived by virtue of inaction under HIPAA; rather, there must be a requirement or an exception

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[7] *Domako*, 438 Mich at 353-354.

for disclosure of protected health information. As ex parte interviews are not required and cannot be compelled, and no exception allows for them, they cannot be used in Michigan, and the *Domako* analysis cannot be sustained under the current mandates of HIPAA.

Further, the majority's reliance on and analysis of MCR 2.302(C) is flawed. While *Domako* suggested that MCR 2.302(C) could be used to impose restrictions on ex parte interviews after the waiver of privilege, the majority here suggests that MCR 2.302(C) could be used to authorize the interviews. I respectfully disagree with the majority's conclusion that the rule authorizes ex parte interviews. MCR 2.302(C) contains no language authorizing ex parte interviews, and the majority fails to explain how this rule could be so interpreted given the content of the rule.[8]

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[8] MCR 2.302(C) provides in pertinent part:

> Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

Finally, my analysis should not be read to suggest or imply that a plaintiff may frustrate legitimate discovery, or engage in the gamesmanship that *Domako* wisely sought to curtail. However, these concerns are effectively addressed in MCR 2.314(B)(2), which provides:

> Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

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(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

While requiring a defendant to conduct discovery by means of a deposition, rather than by an ex parte interview, could not be considered "preventing discovery of medical information," if a plaintiff does assert the privilege during a deposition and thus prevents discovery of medical information, he or she will be precluded from offering testimony at trial relating to his or her medical history or mental or physical condition.

V. CONCLUSION

I respectfully dissent from the holding of the majority that an ex parte interview can be conducted under MCR 2.302(C) in a manner that is consistent with HIPAA, provided that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) as set forth in 45 CFR 164.512(e)(1)(ii)(B). Ex parte interviews involve *oral* disclosures of a covered entity's information. The introductory portion of 45 CFR 164.512 specifically limits *oral* disclosures of a covered entity's information to instances "[w]hen the covered entity is *required by this section* to inform the individual of, *or when the individual may agree to*, a use or disclosure permitted by this section . . ." (Emphasis added.) Because an ex parte interview is not required by either this section or Michigan law, nor is there a requirement within 45 CFR 164.512(e) that a patient be informed of an ex parte interview in a judicial proceeding, and plaintiff has not agreed to an ex parte interview in this instance, the subsections of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing an ex parte interview that involves the oral disclosure of health information.

I also disagree with the majority's conclusion that Michigan law authorizing ex parte interviews is valid and enforceable after the adoption of HIPAA. First, the physician-patient waiver provisions of MCL 600.2157 and MCL 600.2912f are preempted by HIPAA, because they are contrary to, and not more stringent than, HIPAA. Second, the majority errs in its reliance on *Domako* to support ex parte interviews, because *Domako* was based on Michigan law that has since been preempted by HIPAA. I conclude that ex parte interviews are not allowed in Michigan because HIPAA does not specifically authorize ex parte interviews, and Michigan law authorizing such interviews has been preempted.

Finally, by holding that a party is only required to make *reasonable efforts* to obtain a qualified protective order rather than *actually* having to obtain a court order, the majority fails to recognize that the Michigan Court Rules contain no mechanism for a party to only make a *reasonable effort* to obtain a court order. Requiring only a reasonable effort to secure the order can only mean that the request could be incompletely made, or denied altogether, and an ex parte interview could still take place. The majority's analysis and conclusion are completely at odds with our court rules and undermine the authority of trial courts to enforce the court rules and their own orders, and I cannot agree with such an interpretation.

Accordingly, I would vacate the decision of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

Diane M. Hathaway

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

No. 279879

[Filed November 18, 2008]

ANDREA L. HOLMAN, Personal Representative of the Estate of LINDA CLIPPERT, Deceased,

Plaintiff-Appellee,

v

MARK RASAK D.O.,

Defendant-Appellant.

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9:05 a.m.

No. 279879
Oakland Circuit Court
LC No. 2005-068493-NH

Advance Sheets Version

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In this medical-malpractice action, defendant appeals by leave granted the circuit court's order denying his motion for a qualified protective order to allow him to conduct an ex parte interview with the decedent's treating physician. We reverse and remand.

Plaintiff filed this wrongful-death medical-malpractice action alleging that defendant had failed to properly diagnose or treat plaintiff's decedent, Linda Clippert, thereby proximately causing her death. Defendant sought to interview Clippert's treating physicians, but plaintiff refused to waive Clippert's confidentiality rights under the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* Plaintiff signed a waiver allowing the release of medical records, but refused to provide a release for oral communications. Defendant moved for a qualified protective order to permit an ex parte interview with Clippert's treating physician, but the circuit court denied the motion. The court concluded that "the HIPAA provision relative to a protective order only . . . pertains to documentary evidence" and "that HIPAA does not authorize ex parte oral interviews."

A circuit court's decision on a discovery motion is reviewed for an abuse of discretion. *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001). However, an issue of statutory interpretation is reviewed de novo as a question of law. *Rakestraw v Gen Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). Although the decisions of lower federal courts are not binding on Michigan state courts, *Abela v Gen Motors Corp*, 469 Mich 603, 606-

607; 677 NW2d 325 (2004), we are free to adopt their analysis if it is persuasive and instructive, *Cowles v Bank West*, 476 Mich 1, 33-34; 719 NW2d 94 (2006).

HIPAA regulates the retention, use, and transfer of patient information by health-care providers. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007); see also *Bayne v Provost*, 359 F Supp 2d 234, 236 (ND NY, 2005). HIPAA "authorizes regulations governing confidential patient information." *In re Petition of Attorney General*, *supra* at 699. "Under this authority, regulations have been promulgated establishing procedures for the uses and disclosure of such information." *Id.* These regulations make clear that HIPAA applies to both oral and written information. 45 CFR 160.103 (providing that "[h]ealth information means any information, whether oral or recorded in any form or medium"). HIPAA does not prohibit all ex parte communications with an adverse party's treating physician. *Law v Zuckerman*, 307 F Supp 2d 705, 708 (D Md, 2004). "However, HIPAA clearly regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." *Id.*

In Michigan, it was well established before the enactment of HIPAA that the filing of a lawsuit for personal injury or malpractice generally waived the statutory physician-patient privilege with respect to any injury, disease, or condition at issue in the lawsuit, MCL 600.2157, and that a defendant was permitted to meet ex parte with the injured party's treating physician as part of discovery, see *Domako v Rowe*, 438 Mich 347, 361-362; 475 NW2d 30 (1991).

Under HIPAA, however, the filing of a lawsuit does not waive the confidentiality of health information, and unless the patient gives written consent or enters into an agreement, see 45 CFR 164.508; 45 CFR 164.510, the patient's physician may only disclose confidential health information under limited conditions. As observed in *Law*, *supra* at 711:

> HIPAA outlines the steps to follow in order to obtain protected health information during a judicial proceeding in 45 CFR 164.512(e). There are three ways. First, counsel may obtain a court order which allows the health care provider to disclose "only the protected health information expressly authorized by such order." 45 CFR 164.512(e)(1)(i). In the absence of a court order, [45 CFR] 164.512(e)(1)(ii)(A) and (B) provide two additional methods available when used in conjunction with more traditional means of discovery.

Specifically, 45 CFR 164.512(e) provides in pertinent part:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

* * *

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or

proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

We agree with plaintiff that HIPAA supersedes Michigan law to the extent that its protections and requirements are more stringent than those provided by state law. See *Law*, *supra* at 711. Thus, if written consent or an agreement for the disclosure of confidential health information is not provided, a treating physician may only disclose such information

under conditions set out in the HIPAA regulations, one of which provides for qualified protective orders.

But we disagree with the circuit court's determination that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA. While 45 CFR 164.512(e)(1)(ii) does not specifically address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure of protected health information. As our Supreme Court observed in *Domako*, *supra* at 362, where rules are not meant to be exhaustive, "the omission of oral interviews does not mean that they are prohibited." In fact, 45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 CFR 164.512(e)(2) makes clear that the regulations concerning qualified protective orders "do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information." Thus, as the federal district court determined in *Bayne*, *supra* at 241, "if a qualified protective order, consistent with [45 CFR 164.512(e)], was in place then an *ex parte* discussion with the health provider would be appropriate."

Plaintiff argues that it should be sufficient for defendant to rely on written medical records or to depose Clippert's physicians if more information is desired. However, as our Supreme Court observed in *Domako*, *supra* at 360, it is "routine practice . . . to talk with each witness before trial to learn what the witness knows about the case and what testimony the witness is likely to give" and "[t]here is no justification for requiring costly depositions . . . without knowing in advance that the testimony will be useful." *Id.* at 361.

The circuit court erroneously concluded that oral interviews cannot be the subject of qualified protective orders under HIPAA. Quite simply, defendants may conduct an ex parte oral interview with Clippert's physician if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place. *Bayne*, *supra* at 241. We reverse the circuit court's decision and remand this case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

Case No. 05-068-493-NH
Hon. JOHN J. McDONALD

[Entered June 21, 2007]

ANDREA L. HOLAM, Personal Representative for the ESTATE OF LINDA CLIPPERT, deceased, Plaintiff,	)
v	)
MARK RASAK, D.O., Defendant.	)

OPINION AND ORDER

At a session of Court held in the City of Pontiac, County of Oakland, State of Michigan, on June 21, 2007.

PRESENT: HON. JOHN J. McDONALD
CIRCUIT COURT JUDGE

This matter is before the Court upon Defendant's motion for protective order regarding meetings/discussions with Plaintiff's decedent's treating physicians; the Court being fully advised in the premises denies Defendant's motion for the reasons stated below

It does not appear that this issue has been directly addressed by Michigan courts, although an unpublished opinion per curiam by the Michigan Court of Appeals on October 25, 2005 (Docket # 262591) held that "HPAA prevents a physician from disclosing health information absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object. (slip op p 6) But that decision did not rule on whether ex parte interviews are allowable under a qualified protective order because the defendants did not seek such an order.

In the case of *Croskey v BMW of North America*, 2005WL 470476 (EDMich 2005), the district court held that HIPAA does not prevent a litigant from conducting ex parte interviews with health care providers but instead merely prohibits the interview from taking place without the consent of the patient or a qualified protective order that satisfies the requirements of HIPAA.

In the case before this Court, Plaintiff has not authorized defense counsel to conduct ex parte interviews with her decedent's treating physicians. Further here, defense counsel is not seeking written health care information from Plaintiffs decedent's treating physicians, he is seeking ex parte oral discussions with the treating physicians. Under those

circumstances, the Court finds that a qualified protective order that complies with HIPAA (CFR 164.512(E)(1)(v)) cannot be fashioned. This Court believes that HIPAA does not authorize ex parte oral interviews because the HIPAA provision relative to a qualified protective order only seems to pertain to documentary evidence.

Accordingly, Defendant's motion is denied. IT IS SO ORDERED.

JOHN J. McDONALD
JOHN J. McDONALD
CIRCUIT COURT

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register - Doc 1

By: /s/
Deputy

APPENDIX D

SUPREME COURT OF MISSOURI
en banc

No. SC90610

[Filed August 31, 2010]

STATE ex rel. BOBBIE JEAN PROCTOR and VINCENT PROCTOR,	)
Relators,	)
v.	)
THE HONORABLE EDITH L. MESSINA, Circuit Judge, Sixteenth Judicial Circuit, Jackson County, Missouri,	)
Respondent.	)

ORIGINAL PROCEEDING IN PROHIBITION

Opinion issued August 31, 2010

Bobbie Jean and Vincent Proctor seek a writ to prohibit the Circuit Court of Jackson County (trial court) from enforcing its purported discovery order in the pending civil case of *Bobbie Jean Proctor & Vincent Proctor v. Kansas City Heart Group, P.C., Timothy L. Blackburn, M.D., & St. Joseph Medical Center*, Case No. 0816-CV24576. In the case below, the trial court

issued a purported ***formal*** discovery order advising non-parties that the trial court believed it was permissible for these non-party medical providers to engage in ***informal*** *ex parte* communications with attorneys for the defendant in the underlying cause. The court of appeals issued a preliminary writ to examine the extent to which the federal Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191, 110 Stat.1936 (HIPAA), preempted Missouri law on the issue of *ex parte* communications in informal discovery and also to re-examine the State of Missouri's law on this topic. By opinion, the court of appeals made the preliminary writ absolute, and this Court granted transfer.[1]

Facts

Bobbie Jean and Vincent Proctor filed a petition for damages for personal injuries against Kansas City Heart Group, P.C., Timothy L. Blackburn, M.D., and St. Joseph Medical Center. In their petition, the plaintiffs alleged that Bobbie Jean suffered damages arising out of the defendants' medical negligence during her surgery in March 2004.

On January 28, 2009, Blackburn and Kansas City Heart Group, P.C., filed a motion in which they sought a ***formal*** order from the court specifically authorizing ***informal*** ***ex parte*** communications with Bobbie Jean's treating physicians and other health care providers. On February 24, 2009, St. Joseph Medical Center filed

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[1] Portions of the court of appeals principal opinion by Judge Mark D. Pfeiffer and the concurring opinion of Judge James M. Smart, Jr., are used without further attribution.

a similar motion. The trial court heard oral arguments on June 11, 2009. On July 17, 2009, the trial court issued its purported ***formal*** order sustaining the motions and "authorized" non-party medical providers of Bobbie Jean Proctor to engage in ***informal*** *ex parte* communications with attorneys representing defendant medical providers, although the purported "order" specifically advises any of plaintiffs' medical providers presented with the purported "order" that they are free to ignore the purported "order" as it relates to *ex parte* communications with the parties and their attorneys if they have not received authorization from their patient to engage in such *ex parte* communications.[2] The order did not limit the scope of disclosures to matters that would be calculated to lead to admissible evidence. The plaintiffs filed a motion seeking a writ of prohibition.

"Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Marianist Province of the U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo. banc 2008).

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[2] This Court's emphasis on the formality of the trial court's order expressly authorizing informal, *ex parte* communications with a litigant patient's non-party physician absent express authorization from the patient relates to this Court's later discussion that there is no rule of discovery authorizing such an order and that the trial courts in the State of Missouri have no oversight authority to supervise such informal discovery.

Preemption

In *State ex. rel Collins v. Roldan*, 289 S.W.3d 780, 783 (Mo. App. 2009), the court noted that pursuant to the Supremacy Clause of the United States Constitution, HIPAA may preempt Missouri law on the issue of *ex parte* communications between an attorney and a treating physician. The court did not examine or decide the issue because the case was decided on other grounds. *Id.* at 784 n.6. The issue of whether or not HIPAA preempts Missouri law is an issue of first impression in Missouri courts.

The Supremacy Clause of the United States Constitution states that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under this clause, state laws that conflict with federal laws are preempted and have no effect. *Connelly v. Iolab Corp.*, 927 S.W.2d 848, 851 (Mo. banc 1996) (internal citations omitted). The United States Supreme Court has cautioned that in the interest of preventing federal encroachment on the state's authority, a court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find preemption. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Thus, the United States Supreme Court has held that a federal law will preempt state law only when it is the clear and manifest purpose of Congress to do so. *Id.* To determine if Congress intended to preempt state law, the court must examine the text and structure of the federal law. *Id.*

Congress included an express preemption clause in HIPAA. *See* 42 U.S.C.A. § 1320d-7(a). Because HIPAA contains an express preemption clause, this Court's task is to construe the plain language of the statute to determine the extent to which Congress intended for HIPAA to preempt state law. *CSX Transp.*, 507 U.S. at 664.

HIPAA's preemption clause is contained in 42 U.S.C.A. § 1320d-7, which states:

> (1) General rule
>
> Except as provided in paragraph (2), *a provision or requirement under this part, or a standard or implementation specification* adopted or established under sections 1320d-1 through 1320d-3 of this title, *shall supersede any contrary provision of State law*, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.
>
> (2) Exceptions
>
> A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of State law–
>
> (A) is a provision the Secretary determines–
>
> (i) is necessary–

> **(I)** to prevent fraud and abuse;
>
> **(II)** to ensure appropriate State regulation of insurance and health plans;
>
> **(III)** for State reporting on health care delivery or costs; or
>
> **(IV)** for other purposes; or
>
> **(ii)** addresses controlled substances[.]

Pursuant to the authority granted to it under HIPAA, 42 U.S.C.A. § 1320d-2(d)(2)(A), the Secretary of the Department of Health and Human Services (the Secretary) promulgated a federal regulation on HIPAA's preemptive effect. This regulation is similar to HIPAA's statutory language and states that "*[a]* standard, requirement, or implementation specification adopted under this subchapter that is contrary to *a* provision of State law preempts the provision of State law." 45 C.F.R. § 160.203 (emphasis added). The regulations define "State law" as "a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202. 45 C.F.R. § 160.203 also provides exceptions to this general rule and states that HIPAA will not preempt state law when, among other things, the state law is more stringent:

> A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

. . . .

> (b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

HIPAA's language states that "*a* provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede ***any contrary provision*** of State law[.]" 42 U.S.C.A. § 1320d-7(a)(1). The Secretary has stated that, to engage in a preemption analysis, a court must first isolate a specific provision of HIPAA and compare that provision with its analogous state provision:

> The initial question that arises in the preemption analysis is, what does one compare? The statute directs this analysis by requiring the comparison of a "provision of State law [that] imposes requirements, standards, or implementation[] specifications" with "the requirements, standards, or implementation specifications imposed under" the federal regulation. The statute thus appears to contemplate that what will be compared are the State and federal requirements that are analogous, i.e., that address the same subject matter.

Department of Human Health and Services, Standards for Privacy of Individually Identifiable Health

Information, 64 Fed. Reg. 59918, 59995 (Nov. 3, 1999). The Secretary also recognizes that, even if HIPAA preempts one provision of state law, the rest of the state's laws relating to the privacy of an individual's health information would remain enforceable:

> It is recognized that States generally have laws that relate to the privacy of individually identifiable health information. These laws continue to be enforceable, unless they are contrary to part C of title XI or the standards, requirements, or implementation specifications adopted or established pursuant to the proposed subpart x.

Id.

The issue for this Court engaging in HIPAA preemption analysis, therefore, is not whether or not HIPAA, as a general matter, is contrary to and more stringent than the entirety of a state's laws on the privacy of a patient's medical information. Rather, the issue is whether or not a specific provision of HIPAA is contrary to and more stringent than a specific provision of state law. *See also* Beverly Cohen, *Reconciling the HIPAA Privacy Rules with State Laws Regulating ex parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1133 (Winter 2006) (stating that most courts err in performing HIPAA preemption analysis because they fail to isolate specific provisions and instead attempt to determine whether or not the entire state statutory scheme is contrary to the entirety of HIPAA).

Under the plain and ordinary language of HIPAA's preemption clause, to engage in a preemption analysis, this Court must first identify the specific provision of HIPAA that conflicts with any provision of Missouri's law on *ex parte* communications between attorneys and physicians to determine whether or not any provision of Missouri's law on such *ex parte* communications is contrary to any provision of HIPAA's and, if so, whether or not it is more or less stringent than HIPAA's provision.

HIPAA Generally

This Court's examination of HIPAA's privacy rule reviews the text of the regulations mindful of the intent of Congress in directing the Secretary to issue rules and regulations to implement the HIPAA privacy rule. In HIPAA, Congress directed the Secretary to promulgate rules and regulations designed to ***ensure the privacy of patients' medical information***. 42 U.S.C.A. § 1320d-2(d)(2)(A); *see also Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp.2d 1015, 1028 (S.D. Cal. 2004); *Moreland v. Austin*, 670 S.E.2d 68, 70 (Ga. 2008) (HIPAA's goal is to protect a patient's health information). With the overriding governing principle of patient privacy, the Secretary did, in fact, create regulations prohibiting health care providers from disclosing "protected health information," whether "oral or recorded in any form or medium," unless medical providers comply with a narrow list of exceptions separately itemized by the Secretary elsewhere in the Secretary's regulatory scheme. The HIPAA regulations draw no distinction between formal versus informal disclosures and, instead, broadly prohibit all disclosures in the absence of a specifically

enumerated exception to this general rule of prohibition.

> Specifically, the Secretary defined protected "health information" as:
>
> ***[A]ny*** information, whether ***oral*** or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103 (emphasis added). This federal regulation's use of the term *oral* communication clearly includes *ex parte "oral"* communications with a physician; likewise, it encompasses health information that is part of a written medical record or the physician's memory of his treatment of the patient. By its text, HIPAA promotes a renewed awareness of, or emphasis upon, the principle of patient privacy. Further, by its text, HIPAA prohibits physicians from engaging in an *ex parte* oral disclosure of a patient's protected health information unless an express exception applies.

Missouri Law on the Issue of *ex parte* Communications

Missouri common law historically provides that a litigant patient in a personal injury lawsuit could not be compelled by court order to sign medical authorizations consenting to *ex parte* communications with treating physicians. *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo. banc 1989). In *Woytus*, this Court expressed numerous policy statements that mirror the privacy policies of HIPAA, and it is worth noting a number of these statements in analyzing the relationship of HIPAA, Missouri law, and the case presently before us. For illustrative purposes:

> Although the patient is deemed to have waived the statutory privilege with regard to certain information, the ongoing confidential and fiduciary relationship between physician and patient continues to require protection from conduct that might jeopardize the sanctity of that relationship. . . . "A physician occupies a position of trust and confidence as regards his patient – a fiduciary position. It is his duty to act with the utmost good faith. This duty of the physician flows from the relationship with his patient and is fixed by law . . . ."

Id. at 393 (citation omitted). The Court refused to compel a patient to sign a medical authorization order consenting to *ex parte* communications because "the [Missouri Rules of Court] do not expressly forbid *ex parte* discussion, [or] expressly authorize such discussion as a method of discovery." *Id.* at 392. This Court refused to add a non-enumerated discovery

method to the rules because of the potential risks to the physician-patient privilege:

> [T]his Court will not require that a non-enumerated discovery method be added to those already available under the [Missouri Rules of Court]. Information or evidence that can be obtained legitimately through *ex parte* discussion [with treating physicians] can also be obtained through the methods of discovery listed in the [Missouri Rules of Court]. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in deviating from those procedures.

Id. at 395. These risks include the possibility (or, some would argue, probability) that:

> An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views.

Id.

Subsequently, this Court issued a pair of companion opinions addressing voluntary and informal *ex parte* communications between plaintiff's treating physician and defendant or defendant's representatives in a medical malpractice case. *Brandt*

v. Pelican, 856 S.W.2d 658 (Mo. banc 1993) (*Brandt I*); *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667 (Mo. banc 1993) (*Brandt II*).

In *Brandt I*, the issue presented was whether voluntary and informal *ex parte* communications between defense counsel and plaintiff's treating physician (without plaintiff's consent) were prohibited during the discovery period of litigation. 856 S.W.2d at 661. The Court focused on Missouri's physician-patient testimonial privilege statute, § 491.060(5), RSMo Supp. 1992, and answered the question by concluding that there was nothing in this statute that expressly prohibited[3] informal and voluntary *ex parte* communications with plaintiff's physician. *Id.* Lacking a statutory or common law testimonial preclusion for this informal discovery measure, this Court refused to sanction the defendant for the voluntary and informal *ex parte* communication with the plaintiff's treating physician. *Id.* at 662. Notably, though, this Court reaffirmed its previous holding in *Woytus* that a plaintiff cannot be compelled to execute a medical authorization authorizing his treating physicians to engage in *ex parte* communications with the defendant nor could plaintiff's treating physician be compelled to engage in informal *ex parte* discussions with the defense. *Id.* Likewise, this Court commented that it was correct to observe that "*Woytus* 'shows a judicial philosophy that discourages *ex parte* conversations with plaintiff's doctor.'" *Id.* at 661 (citation omitted).

---

[3] There is also nothing in the statute that affirmatively authorizes informal and involuntary *ex parte* communications with a litigant patient's treating physicians.

In *Brandt II*, this Court's starting point of discussion was a reminder that, in *Brandt I*, the Court had concluded that there was no statutory basis in Missouri for concluding that voluntary *ex parte* communications between defense counsel and plaintiff's treating physician were ***prohibited***. 856 S.W.2d at 669. With no statutory basis to ***prohibit*** Missouri personal injury litigants from engaging in informal discovery via *ex parte* voluntary discussion with plaintiff's treating physicians, this Court in *Brandt II* shifted its analysis to whether such voluntary *ex parte* communications by the plaintiff's treating physician violated the physician's common law fiduciary duty of confidentiality. *Id.* This Court decided the case based upon the doctrine of waiver, concluding that once a patient/physician privilege waiver occurs in the filing of a personal injury lawsuit in which the plaintiff's medical condition is placed at issue, the plaintiff has waived both the physician's testimonial privilege and the physician's fiduciary duty of confidentiality, including voluntary *ex parte* conferences with the plaintiff's treating physician within the limited scope of the waiver. *Id.* at 674. Notably, though, this Court in *Brandt II* reiterated its warning in *Brandt I* that nothing in either of these opinions is designed to create any right to compel the plaintiff or his treating physicians to authorize, or participate in, such *ex parte* communications. *Id.* at 674-75.[4]

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[4] This is a medical malpractice case. Informal *ex parte* discovery in such a case presents special inherent risks that are not generally present in other types of personal injury litigation. In *Woytus*, which did not involve a medical malpractice claim, the Court nevertheless felt compelled to mention the risks of *ex parte* interviews in *medical malpractice* cases:

Treating Physicians Comply with HIPAA and Missouri Law

Subsequent to *Brandt I* and *Brandt II*, Congress passed HIPAA. Although Missouri's statutory law and this Court's rules of discovery on the topic of the physician testimonial privilege has remained silent on the issue of voluntary *ex parte* communications with a litigant patient's treating physician, HIPAA is not silent. HIPAA's general rule is that *ex parte* communications with a litigant patient's physician are prohibited. Absent an exception to this general rule in

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> This court will not overlook the current concerns in the medical malpractice insurance industry and the attitudes of physicians and carriers alike. An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

776 S.W.2d at 395 (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F. Supp. 585, 594-95 (M.D. Pa. 1987)). What is possible in an "unauthorized" *ex parte* interview would also be possible in one "authorized" by a court. It is not a likely coincidence that, excepting *Woytus*, the reported cases involving attempts by defendants to engage in *ex parte* interviews with treating physicians are *all* medical malpractice cases.

the enumerated exceptions outlined in HIPAA, HIPAA plainly prohibits such communications.

As this Court noted above, to determine if HIPAA preempts state law, this Court must determine whether or not HIPAA's prohibition of the oral disclosure of plaintiff's protected health information by one or more of plaintiff's treating physicians, absent authorization by plaintiff, preempts Missouri law that fails to prohibit such *ex parte* disclosures. Pursuant to HIPAA's regulations:

> Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:
>
> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub.L. 104-191 . . . as applicable.

45 C.F.R. § 160.202.

Missouri courts are bound to follow HIPAA's statutory and regulatory mandate, but HIPAA does not preempt Missouri law on this particular issue.[5] As this

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[5] HIPAA's general preemption rule is that any state law that is contrary to HIPAA will be preempted. Therefore,

Court noted above, in *Brandt I*, this Court did not affirmatively *create* a right for attorneys to engage in voluntary and informal *ex parte* communication with plaintiff's physician. Instead, this Court merely confirmed that, at that time, there was no state or federal law that *prohibited* such informal communications with plaintiff's physicians. *Brandt I*, 856 S.W.2d at 663. In other words, the holding was that in the absence of a statutory prohibition—either state or federal—it would not prohibit *ex parte* communications between an attorney and a physician.

Application of HIPAA's Enumerated Exceptions Prohibition of *ex parte* Communications

HIPAA's regulation that prohibits the unauthorized disclosure of a patient's protected health information, however, does include enumerated exceptions to the ban:

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key to determining HIPAA preemption is the threshold requirement that preemption by HIPAA will not occur unless the state law and HIPAA are "contrary."

The Privacy Rule defines "contrary" as meaning that "[a] covered entity would find it impossible to comply with both the State and federal [HIPAA Privacy Rule] requirements" (the "[i]mpossibility [t]est"). Stated another way, the two laws are contrary under the impossibility test if any action taken by a covered entity—either to disclose the protected health information or not to disclose the protected health information—would violate either the state law or HIPAA.

Cohen, at 1105-06.

(1) Permitted uses and disclosures. A covered entity is *permitted* to use or disclose protected health information as follows:

(i) To the individual;

(ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506;

(iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of § 164.502(b), § 164.514(d), and § 164.530(c) with respect to such otherwise permitted or required use or disclosure;

(iv) ***Pursuant to and in compliance with a valid authorization under § 164.508***;

(v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510; and

(vi) ***As permitted by and in compliance with this section, § 164.512,* or § 164.514(e), (f), or (g).**

45 C.F.R. § 164.502(a) (emphasis added). For example, under 45 C.F.R. § 164.502(a), HIPAA permits *ex parte* communications between a physician and a third party when the patient expressly authorizes the *ex parte* communications by issuing a valid authorization pursuant to 45 C.F.R. § 164.508(a)(1), which says:

> Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

In this case, however, the plaintiff did not issue an authorization under 45 C.F.R. § 164.508(a)(1). Instead, the trial court issued a purported order directed to non-party medical providers who had provided treatment to the plaintiff authorizing such medical providers to engage in *ex parte* communications with the defendant's attorneys[6] because it believed that its purported order fell under 45 C.F.R. § 164.502(a)'s exceptions for disclosures that are permitted under 45 C.F.R. § 164.512(e). The trial court's purported order states, in pertinent part:

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[6] The effect of the trial court's purported order is to provide an advisory opinion to persons and entities not parties to the underlying litigation. Aside from Missouri's case law that disfavors advisory opinions, *see, e.g.*, *State v. Burgin*, 203 S.W.3d 713, 717 (Mo. App. 2006), here the trial court is communicating an advisory opinion to those not even a party to the underlying litigation. This advisory opinion creates substantial risk on the part of the treating physician who could unintentionally communicate protected health information outside the scope of information waived by the patient's lawsuit. Not only would that have the potential to prejudice the patient by going beyond the waiver and the scope of discovery, but it would also have potential detriment to the physician who would be subject to the severe penalties associated with a HIPAA violation. *See* 42 U.S.C. § 1320d-6(b).

TO: All Hospitals, Clinics, Pharmacies, Physicians, Social Workers, Educators, Psychiatrists, Psychologists, Therapists, Governmental Agencies, (State and Federal); All Other Medical Institutions, Practitioners, Health Care Providers, Past and Present.

. . . .

You are further notified that, pursuant to federal and state law, counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor's treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating, provided the health care provider consents to the interview. This is based on the Court's finding that the plaintiff has made a claim for personal injuries, and in filing this lawsuit has waived any privilege existing between the patient and health care provider. This Order does not require you to meet or speak with any attorney in this proceeding. You have the right to decline an attorney's request to speak or meet with you informally.

. . . .

This Order complies with HIPAA federal standards for privacy of individual health information, 45 C.F.R. Parts 160 and 164. . . .

This Court further enters a qualified protective order consistent with 45 C.F.R. 164.512(e)(1). Specifically, the parties are prohibited from using or disclosing the protected health information of Bobbie Jean Proctor for any purpose other than this litigation. Further, the

> parties agree to return to the covered entity or destroy the protected health information (including all copies made) at the end of this litigation.

(Emphasis removed.)

Under 45 C.F.R. § 164.512(e)(1), HIPAA authorizes disclosure in the course of any judicial or administrative proceeding:

> (1) Permitted disclosures. ***A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:***
>
> (i) ***In response to an order of a court*** or administrative tribunal, provided that the covered entity ***discloses only the protected health information expressly authorized by such order***; or
>
> (ii) ***In response to a subpoena, discovery request***, or other lawful process, that is ***not accompanied by an order of a court*** or administrative tribunal, if:
>
> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(Emphasis added.)

The trial court is correct that the Secretary created exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information and that some of those exceptions are listed in 45 C.F.R. § 164.512(e). The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician.

Stated another way, 45 C.F.R. § 164.512(e)(1) permits a health care provider to disclose otherwise protected health information "***in the course of any judicial or administrative proceeding***" if that disclosure is in response to (i) an order of a court, or (ii) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court. (Emphasis added). Thus, by the express language of 45 C.F.R. § 164.512(e)(1), the covered entity's disclosure must occur "in the course of" a "judicial proceeding," and it must be made in response either to a formal process, whether in the form of a court order, discovery request or other lawful process.

The meaning of a term can vary depending on the context of its use. For instance, when a statute in question fails to provide a statutory definition, and there is no case law interpreting the term in the context of the statute, then the Court presumes that the term is used according to its plain and ordinary meaning. The term "judicial proceeding" would be commonly understood to refer to a case filed in a judicial forum. "In the course of" a judicial proceeding, thus, would be commonly understood to include matters that occur while a case is pending in a judicial forum. This is consistent with the dictionary definition of "in the course of," which defines "in the course of" as (1) "undergoing the specified process . . . (2) during the specified period . . . (3) during and as part of the specified activity." THE NEW OXFORD AMERICAN DICTIONARY 389 (2nd ed. 2005). The dictionary may be used to derive the plain and ordinary meaning of a term. *Tendai v. Mo. Bd. of Registration for the Healing Arts*, 161 S.W.3d 358, 366 (Mo. banc 2005) (*overruled on other grounds*).

In the context of defamation, however, the phrase "judicial proceedings" has been interpreted more broadly because of the nature of the privilege involved. *Roberson v. Beeman*, 790 S.W.2d 948, 950 (Mo. App. 1990), held that a demand letter sent before trial was considered within judicial privilege because "published in the course of a judicial proceeding." *See also Pape v. Reither*, 918 S.W.2d 376, 381 (Mo. App. 1996) (settlement letter sent before trial is within judicial proceedings for purposes of the judicial privilege against defamation).

By contrast, the Missouri legislature, for purposes of a criminal statute, defined "judicial proceeding"

narrowly as "any official proceeding in court, or any proceeding *authorized by or held under the supervision of a court*[.]" § 575.010 (4), RSMo Supp. 2009 (emphasis added).

BLACK'S LAW DICTIONARY 122 (5th ed. 1979) (citation omitted) defines "authorize" as:

> [t]o empower, to give a right or authority to act. To endow with authority or effective legal power, warrant, or right. To permit a thing to be done in the future. It has mandatory effect or meaning, implying a direction to act.
>
> "Authorized" is sometimes construed as equivalent to "permitted"; or "directed," or to similar mandatory language. Possessed of authority; that is, possessed of legal or rightful power, the synonym of which is "competency."

BLACK'S LAW DICTIONARY defines "supervision" as "[a]n act of occupation of supervising; inspection." *Id.* at 1290. It also defines "supervise" as "[t]o have general oversight over, to superintend or to inspect." *Id.*

While neither HIPAA nor its regulations expressly define "in the course of" or "judicial proceeding," or expressly state whether the term should be given its common, narrow or broad legal definitions, a narrow definition is implicit in HIPAA's regulatory requirement in 45 C.F.R. § 164.512(e)(1) that a covered entity may make disclosures only pursuant to a court order or subpoena, discovery request, or other lawful process. The Secretary has stated that this means that:

> In § 164.512(e) of the final rule, we permit covered entities to disclose protected health information ***in a*** judicial or administrative proceeding if the request for such protected health information is made through or pursuant to an order from a court or administrative tribunal or in response to a subpoena or discovery request from, or other lawful process by a party to the proceeding.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82529 (Dec. 28, 2000) (emphasis added). In other words, such disclosure must be under the supervisory authority of the court either through discovery or through other formal court procedures.

This regulation does not itself authorize any additional process or procedure for obtaining a court order, subpoena, or other lawful process; that is left to the rules in the individual states.[7] In this context,

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[7] As a result, various courts in other states presented with the issue of whether *ex parte* interviews of treating physicians are permissible in personal injury and medical malpractice cases after the enactment of HIPAA come to different conclusions. For example:

(1) The Michigan Supreme Court permitted defense counsel in a medical malpractice case to seek *ex parte* interviews with plaintiffs treating physicians, but Michigan had a specific statute authorizing this procedure. Mich. Comp. Laws § 600.2912f(2000); *Holman v. Rasak*, ___ N.W.2d ___, 486 Mich. 429, 2010 WL 2756993 (Mich. 2010).

(2) The Georgia Supreme Court, without reference to any rules of discovery, simply relied upon the language in HIPAA regarding qualified protective orders and "public policy" to hold that a trial court could enter a narrowly-drawn protective order

under Missouri's civil procedure rules, the trial court has the authority and oversight over: (1) pretrial motion proceedings and trial (*i.e.*, official proceedings in court) and (2) formal discovery (*i.e.*, proceedings authorized by or held under the supervision of a court). *State ex rel. Norman v. Dalton*, 872 S.W.2d 888, 891 (Mo. App. 1994).

None of these rules authorizes an order directing or authorizing a physician to engage in *ex parte* communications. Missouri case law is clear that while Missouri law has not prohibited a party from engaging in voluntary *ex parte* communications with a treating physician, the trial courts have never supervised these communications nor exercised authority over them, and the trial courts have not had authority to compel a plaintiff to expressly authorize *ex parte* discussions with her physician. *Brandt I*, 856 S.W.2d at 661; *Woytus*, 776 S.W.2d at 392. Further, the trial courts had no authority to force a physician, over his own objection, to engage in informal *ex parte* discussions with an attorney during discovery. *Brandt I*, 856 S.W.2d at 662. Given Missouri's law on the subject of *ex parte* physician communications, the meeting at

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to allow an *ex parte* interview of a treating physician in a medical malpractice case. *Baker v. Wellstar Health Sys., Inc.*, ___ S.E.2d ___, 2010 WL 2159372 (Ga. 2010).

(3) The New Jersey Superior Court permitted the *ex parte* interviews with plaintiff's treating physicians by ordering plaintiff to sign an authorization permitting such interviews. But, the authorization was to clearly indicate that the physician's participation was voluntary. Additionally, any interview was required to be recorded and transcribed and a copy of the transcript provided to plaintiff's counsel. *Diet Drug Litigation v. Wyeth, Inc.*, 895 A.2d 493 (N.J. Super. Ct. Law Div. 2005).

which *ex parte* communications occur is not a judicial proceeding because the trial court has no general oversight of the meeting or any control over it.[8] Thus, 45 C.F.R. § 164.512(e), which permits disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications, and consequently, a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications.

In both *Brandt* opinions, this Court reiterated its conclusion that a plaintiff cannot be compelled by a trial court to sign an authorization consenting to *ex parte* communications with his treating physicians in favor of defendants or their attorneys. The rationale for the holdings of the *Brandt* opinions is particularly relevant to this Court's resolution of this case today:

> [T]his court will not require that a non-enumerated discovery method be added to those already available under the [Missouri Rules of Court]. Information or evidence that can be obtained legitimately through *ex parte* discussion [with treating physicians] can also be

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[8] In reaching our conclusion, we stop short of enthusiastically endorsing the idea that a physician should freely engage in ex parte discussions regarding a patient's condition. When a doctor engages in ex parte communications with a patient's adversaries, there is a risk that the disclosure will exceed the bounds of the waiver of the privilege.

856 S.W.2d at 674-75.

> obtained through the methods of discovery listed in the [Missouri Rules of Court]. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in deviating from those procedures.

Woytus, 776 S.W.2d at 395.

The rules of discovery enumerated by this Court are found at Rules 56 to 61. These rules provide the trial court discretion to issue orders relating to the perimeters of interrogatories, depositions, production of documents, requests for admission, physical and mental examinations, and discovery sanctions. The defense in this case concedes that there is no discoverable information that they could obtain from an informal *ex parte* discussion with the treating physician that they could not obtain by use of these rules of discovery. However, there is nothing in these rules of discovery that authorizes the trial court to issue orders governing methods of ***informal*** *ex parte* communications with plaintiff's non-party treating physicians.

Likewise, there is no regulation in the HIPAA framework that authorizes a trial court in Missouri to issue an order permitting a physician to divulge a patient's protected health information outside the confines of a judicial proceeding over which the trial court has direct supervision thereof. Compliance with HIPAA and this Court's rules of discovery will ensure the disclosure of the health information and at the same time limit the potential liability of a treating physician who was prompted to provide protected

health information.[9] The treating physician in this case can comply with HIPAA by not giving an *ex parte* interview without an authorization and also comply with Missouri common law by choosing not to grant the *ex parte* interview.[10]

Conclusion

In the instant case, by issuing a purported ***formal*** order that was directed to non-party medical providers and, essentially, providing an advisory opinion to said non-party medical providers about the trial court's understanding of the law on ***informal*** *ex parte* communications, the trial court exceeded its authority, and the preliminary writ of prohibition is made permanent.

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[9] Of note, a health care provider who, in violation of the HIPAA privacy rule, unlawfully obtains or discloses individually identifiable protected health information can be fined up to $50,000 or imprisoned for up to one year, or both. *See* 42 U.S.C.A. § 1320D-6.

[10] If either the state law or HIPAA (or both) is permissive, that is, at least one of the statutes allows a particular action but does not compel it, then the statutes are not contrary under the impossibility and obstacle tests. For example, if a state law permits ex parte interviews and HIPAA allows them if certain procedures are followed, then a covered entity could be in compliance with both statutes by either not engaging in ex parte discussions at all (since neither statute compels them), or by engaging in them after satisfying HIPAA's procedural requirements. Since there are no impediments to complying with both HIPAA and the state law, the statutes are not contrary under the impossibility test, and the state law is not an obstacle to HIPAA compliance.

Cohen, at 1140 (internal citations omitted).

Zel M. Fischer, Judge

All concur.